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No. 2140

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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SPRING GARDEN INSURANCE COM-  
PANY (a Corporation),

*Plaintiff in Error,*

*vs.*

JACOB MILLER,

*Defendant in Error.*

---

Transcript of Record

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Upon Writ of Error to the United States District Court  
for the Eastern District of Washington, Northern Division

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CLERK.

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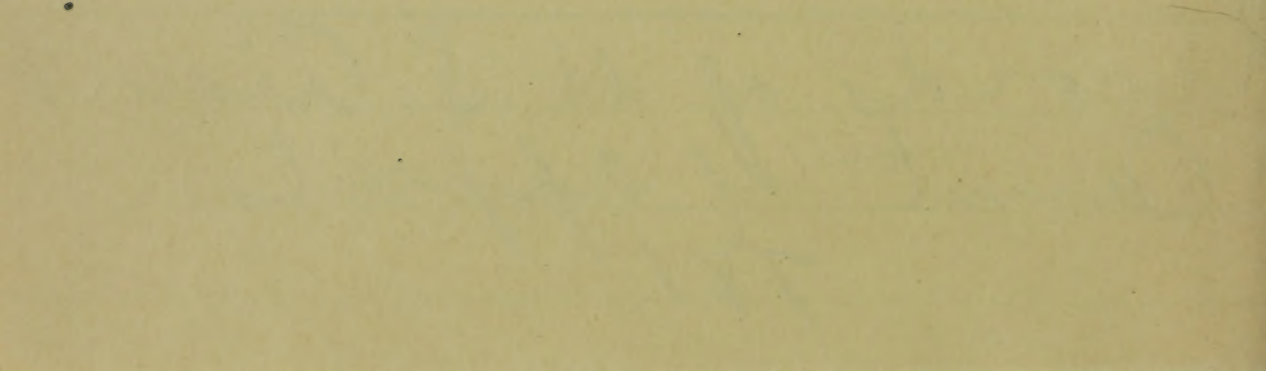
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Records of U. S. Circuit  
Court of appeals  
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No. \_\_\_\_\_

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*In the District Court of the United States, Eastern District of Washington, Northern Division.*

No. 1563.

JACOB MILLER,

*Plaintiff,*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

NAMES AND ADDRESSES OF ATTORNEYS OF  
RECORD.

EDWARD J. CANNON, Old National Bank Building,  
Spokane, Washington,

EDELSTEIN & WEINSTEIN, Old National Bank  
Building, Spokane, Washington,

*Attorneys for Plaintiff.*

HAPPY, CULLEN, LEE AND HINDMAN,  
Hyde Building, Spokane, Washington,

*Attorneys for Defendant.*

---

*In the Superior Court of the State of Washington in and  
for the County of Spokane.*

JACOB MILLER,

*Plaintiff.*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

COMPLAINT.

Plaintiff complains of the defendant and alleges as  
follows:

## I.

That at all times hereinafter mentioned the defendant, The Spring Garden Insurance Company, is a corporation and was and still is engaged in the business of writing fire insurance contracts and issuing written policies of insurance covering losses by fire on property within the State of Washington, and is authorized to do such business as fire underwriters within the State of Washington.

## II.

That on or about the the 17th day of November, 1910, and for the consideration of the premium paid to it in the sum of one hundred thirty-seven dollars and fifty cents (\$137.50) by the plaintiff the defendant corporation contracted and agreed with plaintiff to insure his property by him owned for a period of one year from the 17th day of November, 1910, at noon, to the 17th day of November, 1911, at noon; and in evidence thereof executed, or caused to be executed by its duly authorized and acting agents, and issued to the plaintiff its certain policy of fire insurance No. 7349 in the sum of five thousand dollars (\$5,000.00), insuring plaintiff against all losses by fire which might occur to the property of the plaintiff situated in the village of Camden, Washington, and described as follows:

“5,000.00 on stock of goods, wares and merchandise of every kind and description, consisting principally of groceries, hardware, crockery, provisions and produce, novelties, cutlery, and such other merchandise as is generally found in a general merchandise store, their own or held by them in trust or on

commission, or sold but not removed; all while contained in the one and two story frame, shingle roof building and|or additions adjoining and|or communicating or in cellars or basement thereto, situate on the southwest corner of the S. . W $\frac{1}{4}$  of Section Thirty-four (34), Township Thirty (30), North, Range Forty-four (44), E. W. M., Camden, Washington, being about thirty (30) miles east of Spokane, Washington.”

A true and correct copy of the fire insurance policy so issued by the defendant to the plaintiff is attached hereto and marked “Plaintiff’s Exhibit A,” which is prayed to be taken and read as a part of this complaint to all intents and purposes as though set forth herein in full.

### III.

That at the time of the issuance of the policy aforesaid, and ever since that time and until the above described property was destroyed by fire, the said property was owned absolutely by the plaintiff; that on or about the 2nd day of January, 1911, and while said policy was in force and effect, the property covered by said insurance contract and described above was entirely destroyed by fire, and plaintiff thereby suffered a total loss of the property covered by said policy; that said fire did not occur from any of the causes excepted in said policy; that on account of said fire and said contract of insurance issued by the defendant, the defendant became liable to the plaintiff for the full sum of money for which said property was insured; that the plaintiff carried concurrent insurance on said property by and with the consent of the defendant on said merchandise aggregating five thou-



sand dollars (\$5,000.00) in addition to the amount of the insurance issued by this defendant; that a fair and reasonable value of the stock of merchandise so destroyed by fire and covered by the insurance of defendant herein and belonging to the plaintiff was eleven thousand one hundred and fifty-one 21-100 (\$11,151.21).

IV.

That immediately following the loss by fire the plaintiff notified, and caused to be notified, the defendant of the burning and destruction of said property as provided in said policy, and within sixty (60) days next after the burning of said property plaintiff furnished, and caused to be furnished, to the defendant a proof of loss verified under oath as required under the said policy.

V.

That plaintiff has at all times since the issuance of said policy made reasonable compliance with, and observed all of the terms and conditions of the said policy of insurance to be observed and performed on his part; that he has demanded the payment of the loss under the said policy of insurance and the defendant has wholly failed and refused to pay the amount due this plaintiff, and still refuses to pay the same.

Wherefore plaintiff prays judgment against the defendant in the sum of five thousand dollars (\$5,000.00), together with lawful interest on said sum from January 2nd, 1911, until paid, and the costs and disbursements of this action.

(Signed) EDELSTEIN & WEINSTEIN,

(Signed) CANNON, FERRIS, SWAN & LALLY,

*Attorneys for Plaintiff.*

State of Washington,  
County of Spokane—ss.

Jacob Miller, being first duly sworn, says: That he is the plaintiff in the above entitled cause; that he has read the above and foregoing complaint; that he knows the contents thereof, and that the same is true as he verily believes.

(Signed) JACOB MILLER.

Subscribed and sworn to before me this 10th day of May, 1911.

(Signed) SAMUEL EDELSTEIN,  
*Notary Public for Washington, Residing at Spokane.*

“EXHIBIT A.”

No. 7349.          STOCK COMPANY.          \$5,000.00.

THE SPRING GARDEN INSURANCE CO.,  
PHILADELPHIA.

In consideration of the stipulations herein named and of one hundred thirty-seven and 50-100 dollars premium does insure Jacob Miller for the term of one year from the 17th day of November, 1910, at noon, to the 17th day of November, 1911, at noon, against all direct loss or damage by FIRE, except as hereinafter provided to an amount not exceeding FIVE THOUSAND AND NO-100 Dollars to the following described property while located and contained as described herein, and not elsewhere, to-wit: (As per slip attached hereto and signed by the duly authorized Agent of the Company.

JACOB MILLER.

\$5,000.00. On stock of goods, wares and merchandise of every kind and description, consisting principally of groceries, hardware, crockery, provisions and pro-



duce, novelties cutlery and such other merchandise as is generally found in a general mercantile store their own or held by them in trust or on commission, or sold but not removed; all while contained in the one and two story frame, shingle roof building and | or additions adjoining and | or communicating, or in cellars or basement thereto, situate on the southwest corner of Range Forty-four (44), E. W. M., Camden, Washington, being about thirty (30) miles east of Spokane Washington.

Permission granted to the effect that other insurance; to make ordinary alterations and repairs; to burn kerosene of standard quality for lights lamps to be filled during daytime only, to keep not to exceed fifty (50) pounds of powder and two hundred (200) gallons of refined kerosene, it being warranted by the assured that the oil shall be drawn by daylight, or at a distance of not less than ten (10) feet from artificial light.

#### LIGHTING CLAUSE.

This Policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term "lightning," and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured nor the interest of the insured in the property and subject in all other respects to the terms and conditions of this Policy; provided, however that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not; and, provided further, that if dynamos, excitors, lamps, motors, switches or any other apparatus



for generating, utilizing, testing, regulating or distributing electricity are insured under this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, or from lightning, unless fire ensues, and then for the loss by fire only.

This slip is attached to and hereby made a part of Policy No. 7349 of the Spring Garden Insurance Company of Philadelphia.

Dated this 17th day of November, 1910.

CHESTER H. HARVEY, Agent.

By C. HARVEY.

This policy is made and accepted subject to the foregoing stipulations and conditions, and the stipulations and conditions states in detail on the reverse side of this contract, which form a part hereof as fully as if recited herein together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added hereto, and as to such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, this company has executed and attested these presents this 17th day of November, 1910.

This policy shall not be valid until countersigned by the duly authorized Agent of the Company at Cheney, Washington.

EDWARD L. GOFF, *Secretary*.

CLARENCE E. PORTER, *President*.

Countersigned by CHESTER H. HARVEY, *Agent*.

By C. HARVEY.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this Company, or if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this Company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this Company, in accordance with the terms of this policy.

It shall be optional, however, with this Company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this Company of the property described.



This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part in this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of in-



surance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kereosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This Company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by négllect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This Company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debts, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held in storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described. ,

If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this Company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request notice of such cancellation. If this policy shall be can-



celed as hereinbefore provided, or become void or cease, of the insured; or by the Company by giving five days' the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retainnig the customary short rate; except that when this policy is canceled by this Company by giving notice it shall only retain the pro rata premium.

If, with the consent of this Company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such locations; but this Company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.



If fire occur the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quality and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; any change in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; and shall furnish, if required, verified plans and specifications of any building, fixtures, of machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any

person designated by this Company all that remains of any property herein described, and submit to examination under oath by any person named by this Company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this Company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties hereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This Company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirements, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this Company, including an award by appraisers when appraisal has been required.



This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under this policy or of the contribution to be made by this Company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this Company shall claim that the fire was caused by the act of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insur-



ance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended thereto.

Endorsement: COMPLAINT.

Filed in the U. S. Circuit Court for the Eastern District of Washington, November 15, 1911.

FRANK C. NASH, *Clerk.*

---

*In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.*

JACOB MILLER,

*Plaintiff,*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

ANSWER.

Comes now the defendant herein, and answering the complaint of the plaintiff, admits, denies and alleges as follows:

1st. As to paragraph 3 this defendant admits that on the 2nd day of January, 1911, the property covered by said insurance contract was destroyed by fire, and that the plaintiff carried concurrent insurance on said property, aggregating the sum of five thousand dollars (\$5,000.00), in addition to the amount of insurance issued by the defendant; but this defendant has not sufficient knowledge to form a belief that the value of said property so destroyed was the sum of eleven thousand one hundred fifty-one and 21-100 dollars (\$11,151.21), or any other sum, and this defendant denies each and

every other allegation in said paragraph contained.

2nd. As to paragraph 4, this defendant admits that immediately following the loss by fire the plaintiff caused to be notified the defendant of the burning and destruction of said property, as provided in said policy, but denies each and every other allegation in said paragraph contained.

3rd. As to paragraph 5, this defendant admits that plaintiff has demanded payment of said alleged loss, and that defendant has refused to pay the same, and denies each and every other allegation in said paragraph contained.

And this defendant, further pleading, and as a first, separate defense to plaintiff's alleged cause of action, says:

1st. That after the issuing and delivering of the policy sued on in this action that the plaintiff herein, Jacob Miller, contrary to the terms and provisions of said policy, kept, used and allowed on the premises described in the policy and in said plaintiff's complaint, gasoline, and that by reason thereof said policy was at the time of the commencement of the action, and now is, wholly void and of no force or effect.

And this defendant further pleading, and as a second and further defense to plaintiff's alleged cause of action, says:

1st. That plaintiff herein, Jacob Miller, between the 18th day of October, 1910, and the 2nd day of January, 1911, built on to the one and two story frame, shingled-roof building mentioned and described in plaintiff's complaint and in the policy sued on in this action, a building

or addition thereto, 30 feet wide by 50 or 60 feet long, at an expense of about \$5,000.00, and in so doing continually, from said October 18th, 1910, until January 2nd, 1911, employed a mechanic or mechanics, and eight or ten laborers and assistants in constructing said building or addition, and said laborers and mechanics, with the knowledge of the plaintiff, allowed and permitted shavings and other debris to accumulate about and around said premises and building, \* \* \* changed the partitions and doors therein, \* \* \* put in shelves and other permanent and temporary fixtures and improvements, and otherwise made changes therein, and said laborers and mechanics, with the knowledge of plaintiff, smoked and used matches in so doing during said period of time, and plaintiff permitted and allowed lumber to be piled in and immediately surrounding said premises, and otherwise increased the hazard, and by reason of the acts hereinabove alleged, and the breach in the terms of said policy of insurance by said plaintiff, as herein specifically alleged, said policy was at the time of the commencement of this action, and is now, totally and wholly void.

WHEREFORE, defendant prays that it may go hence without day, and have its costs and disbursements of this action.

(Signed) HAPPY, WINFREE & HINDMAN,

*Attorneys for Defendant.*

State of Washington,

County of Spokane—ss.

W. W. Hindman, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the



defendant corporation, The Spring Garden Insurance Company, the defendant named in the foregoing answer, and makes this affidavit on its behalf, having been duly authorized by said corporation so to do; and affiant further says that he has read the foregoing answer, knows the contents thereof, and the facts therein stated are true as he verily believes.

(Signed) W. W. HINDMAN.

Subscribed and sworn to before me this 14th day of September, A. D. 1911.

(SEAL.)

(Signed) B. A. HOFFINE,

*Notary Public, Residing at Spokane, Washington.*

Endorsements: ANSWER.

Service of the within answer is hereby acknowledged this —— day of September, 1911, in the County of Spokane, Washington.

(Signed) EDELSTEIN & WEINSTEIN,

*Attorneys for Plaintiff.*

Filed in the U. S. Circuit Court for the Eastern District of Washington, October 11, 1911.

FRANK C. NASH, *Clerk.*

By W. H. HARE, *Deputy Clerk.*

---

*In the Circuit Court of the United States for the Eastern District of Washington.*

JACOB MILLER,

*Plaintiff.*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

## REPLY.

Plaintiff, for a reply to the separate defenses herein pleaded in defendant's answer, alleges:

## I.

Replying to the first separate defense, plaintiff expressly denies each and every allegation, averment, matter and thing in said first affirmative defense contained, whether as therein stated or otherwise.

## II.

Replying to the defendant's second separate defense, plaintiff denies each and every allegation, averment, matter and thing in said second defense stated, whether as therein alleged or otherwise, except that plaintiff states that a small amount of work was done on and about said building between the dates stated; that the agents of the defendant knew of the alterations, changes, construction and repairs being made on or about said building and consented thereto, and the policy of insurance sued upon in this action was written while the work, alterations, changes and repairs aforesaid were being done.

Wherefore, plaintiff prays judgment as in his complaint asked for.

(Signed) EDELSTEIN & WEINSTEIN,

(Signed) CANNON, FERRIS, SWAN & LALLY,

*Attorneys for Plaintiff.*

State of Washington,

County of Spokane—ss.

R. Weinstein, being first duly sworn, says: That he is one of the attorneys for plaintiff; that plaintiff is absent from Spokane County and cannot be present to verify this reply; that affiant is authorized to verify the same

on plaintiff's behalf; that affiant has read the foregoing reply, that he knows the contents thereof, and that the same is true as he verily believes.

(Signed) R. WEINSTEIN.

Subscribed and sworn to before me this 3rd day of October, 1911.

(Signed) SAMUEL EDELSTEIN,

*Notary Public for Washington, Residing at Spokane.*

Endorsements: Due service by a full, true and correct copy of the within reply is hereby acknowledged this 3rd day of October, 1911.

(Signed) HAPPY, WINFREE & HINDMAN,

*Attorneys for Defendant.*

Reply: Filed in the U. S. Circuit Court for the Eastern District of Washington, October 12, 1911.

FRANK C. NASH, *Clerk.*

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*In the District Court of the United States for the Eastern  
District of Washington, Northern Division.*

No. 1563.

JACOB MILLER,

*Plaintiff.*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

### OPINION.

Eidelstein & Weinstein and Edward J. Cannon, for plaintiff; Happy, Winfree & Hindman, for defendant.

RUDKIN, District Judge.

On the 17th day of November, 1910, the defendant



executed and delivered its certain policy of insurance, insuring the plaintiff for the term of one year from the 17th day of November, 1910, at noon, to the 17th day of November, 1911, at noon, against all direct loss or damage by fire, to an amount not exceeding the sum of \$5,000.

“On stock of goods, wares and merchandise of every kind and description, consisting principally of groceries, hardware, crockery, provisions and produce, novelties, cutlery and such other merchandise as is generally found in a general mercantile store, their own or held by them in trust, or on commission, or sold but not removed; all while contained in the one and two story frame shingle roof building and additions adjoining and connecting, or in cellars or basements thereto, situate on the Southwest corner of the Southwest  $\frac{1}{4}$  of Section Thirty-four (34), Township Thirty (30), North Range Forty-four (44) E. W. M., Camden, Washington, being about thirty (30) miles East of Spokane, Washington.”

On the second day of January, 1911, and during the life of this policy, the insured property was totally destroyed by fire, and the present action was thereafter instituted to recover the amount of the insurance. The only issues in the case over which there is any substantial controversy are presented by the two affirmative defenses set forth in the answer. The defenses are:

First: “That after the issuing and delivery of the policy sued on in this action, that the plaintiff herein, Jacob Miller, contrary to the terms and provisions of said policy, kept, used and allowed on the premises de-

scribed in the policy and in said plaintiff's complaint, gasoline, and that by reason thereof said policy was at the time of the commencement of the action, and now is, wholly void and of no force or effect."

Second: That plaintiff herein, Jacob Miller, between the 18th day of October, 1910, and the 2nd day of January, 1911, built on to the one and two story frame, shingle roof building mentioned and described in plaintiff's complaint and in the policy sued on in this action, a building or addition thereto, 30 feet wide by 50 or 60 feet long, at an expense of about \$5000, and in so doing continually, from said October 18th, 1910, until January 22nd, 1911, employed a mechanic or mechanics, and 8 or 10 laborers and assistants, in constructing said building or addition, and said laborers and mechanics, with the knowledge of plaintiff, allowed and permitted shavings and other debris to accumulate around and about said premises and buildings, changed the partitions and doors therein, put in shelves and other permanent and temporary fixtures and improvements, and otherwise made changes therein, and said laborers and mechanics, with the knowledge of plaintiff, smoked and used matches in so doing, during said period of time, and plaintiff permitted and allowed lumber to be piled in and immediately surrounding said premises, and otherwise increased the hazard, and by reason of the acts hereinabove alleged, and the breach in the terms of said policy of insurance, by said plaintiff, as herein specially alleged, said policy was at the time of the commencement of this action, and is now totally and wholly void."



These defenses are based on printed stipulations and conditions attached to the policy, which provide that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if \* \* \* the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at one time, or if \* \* \* there be kept, used or allowed on the above described premises \* \* \* gasoline \* \* \*."

Also, on a typewritten slip, or rider, attached to the policy, containng this further provision:

"Permission granted to effect other insurance; to make ordinary alterations and repairs; to burn kerosene of standard quality for lights, lamps to be filled during daytime only; to keep not to exceed fifty (50) pounds of powder and two hundred (200) gallons of refined kerosene, it being warranted by the insured that oil shall be drawn by daylight, or at a distance of not less than ten (10) feet from artificial light."

The first affirmative defense was not much relied on in argument and is not supported by the proofs. The plaintiff was examined under oath, after the fire, pursuant to the terms of the policy, and testified that at the time of the fire a five-gallon can of gasoline was kept or stored on the insured premises. At the trial, however, the person who removed the gasoline from the depot testified that he stored it in an adjacent building, from which it was removed intact some days after the fire. This witness was corroborated by other testimony.



The facts upon which the second affirmative defense is based are substantially as follows:

Prior to the issuance of the policy the plaintiff was the owner of a two story frame building at Camden, 25x58 feet, the second story of which had been used as a dance hall. About the middle of October, 1910, mechanics were employed to make alterations in this building. The second story was converted into a rooming or lodging house; an addition 30x50 feet was built onto one side of the old structure; the wall or partition was taken out, converting the entire building into a single store-room, and other changes made. While this work was in progress the plaintiff was beset by insurance agents who desired to insure his property. After numerous conferences the policy in suit was written on the 17th day of November. At that time the remodeling of the building was in progress and the agents of the company were fully advised as to the contemplated changes, and, according to their report to the company, visited the building in person. After the policy was written, work on the building was prosecuted with diligence, as appears from the allegations of the answer, and was not quite completed on the second day of January following, when the building and contents were destroyed by fire.

Under the foregoing facts the defendant contends that the provision of the policy prohibiting the employment of mechanics in altering or repairing the premises for more than fifteen days at one time, and the permission granted by the slip or rider to make ordinary alterations and repairs, were violated, and that by reason

thereof the entire policy became null and void.

The fundamental rule which excludes parole evidence to vary or contradict the terms of a valid, written contract is enforced much more strictly in the Federal courts than in the courts of this and many other states, especially in this class of actions. For the rule in the Federal courts see:

*Assurance Company vs. Building Association*,  
183 U. S. 308.

For the rule in this state see:

*Staats v. Pioneer Insurance Co.*, 55 Wash. 51,  
and cases cited.

It will be conceded at the outset, therefore, that the written contract entered into between the parties to this action must speak for itself, and that if valid conditions attached to that contract have been violated by the plaintiff judgment must go against him. But where the terms of a contract are at all doubtful or ambiguous the court may consider the situation of the parties, the object they had in view, and all the surrounding circumstances, without violating the rule in question. The printed conditions attached to the policy in this case prohibited the employment of mechanics "in building, altering, or repairing the within described premises for more than fifteen days at any one time," and this provision did not meet the requirements of the parties. At the time of the issuance of the policy improvements were under way which would continue for more than the fifteen day period, and it became necessary to make some other provision to meet the existing conditions. To that end a rider was attached to the policy permitting



the making of ordinary alterations and repairs without any apparent limit as to time. The object of this change was to provide for the repairs or alterations then in progress. It may be said that the words "ordinary alterations and repairs" are not ambiguous, but the terms are general, at least, and it does no violence to the language of the contract, and certainly none to the intention of the parties, to hold that the changes in progress on this building were ordinary alterations and repairs within the contemplation of the parties. This construction avoids a forfeiture and gives life to the contract. It credits the parties with good faith and not with fraud, as would be the necessary effect of any other construction the court might adopt. The extra hazards complained of were a mere incident to the alterations and repairs, and if the latter were authorized the extra hazards were likewise. Finding and judgment will therefore be entered for the plaintiff according to the prayer of the complaint.

Endorsements: OPINION.

Filed February 8, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*



*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division).*

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

No.

MOTION FOR NEW TRIAL.

Comes now the defendant herein and moves the Court for a new trial for the following reasons:

1st. Insufficiency of the testimony to support the judgment.

2nd. Errors of law occurring at the trial, and excepted to by the defendant.

W. W. HINDMAN,

*Attorney for Defendant.*

Endorsements: Motion for new trial.

Filed March 1st, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy Clerk.*

*In the District Court of the United States, Eastern District of Washington, Northern Division (Successors to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division).*

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

No.

ORDER.

After hearing argument of defendant on motion for a new trial, and the court being advised in the premises,

IT IS ORDERED, That the same be, and the same is, hereby overruled.

Defendant excepts and exceptions allowed.

FRANK H. RUDKIN,

*Judge.*

Endorsements: Order denying motion for new trial.

Filed March 1, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, Deputy.

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

JACOB MILLER,

*Plaintiff,*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

## JUDGMENT.

The above entitled cause came duly on for hearing and trial before this Court on the 16th day of November, 1911, at ten o'clock a. m., without a jury, a jury trial having been duly waived by the parties, the plaintiff and defendant, plaintiff appearing in person and by his attorneys, Edelstein & Weinstein and Cannon, Ferris, & Swan, and defendant appearing by its attorneys, Happy, Winfree & Hindman, and after hearing and considering the testimony and evidence introduced by the plaintiff and defendant and the argument of counsel, and duly considering the same, the Court being fully advised in the premises, on the 8th day of February, 1912, duly prepared and filed its opinion herein, wherein the Court directed that judgment be entered for the plaintiff according to the prayer of the complaint; now it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of five thousand (\$5,000) dollars, together with its costs and disbursements herein.

To all of which defendant excepts and exception allowed.

Let judgment be entered accordingly.

Done in open court this 5th day of April, 1912.

(Signed) FRANK H. RUDKIN,

*Judge.*

Endorsements: Judgment. Filed in the U. S. District Court for the Eastern District of Washington, April 5, 1912.

W. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*



*In the District Court of the United States, Eastern District of Washington, Northern Division, Successors to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.*

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

No.

NOTICE.

To Jacob Miller and to your attorneys, E. J. Cannon, Samuel Edelstein and Robert Weinstein.

You and each of you will hereby take notice that the defendant herein, The Spring Garden Insurance Company, has this day filed with the Clerk of the District Court of the United States, Eastern District of Washington, Northern Division, its Bill of Exceptions in the above entitled action, a copy thereof being hereby served on you.

W. W. HINDMAN,

*Attorney for Defendant, Spring Garden Ins. Co.*

Endorsements: Service of the above and foregoing notice is hereby acknowledged this 5th day of April, 1912.

(Signed) E. J. CANNON, SAMUEL EDELSTEIN  
and ROBERT WEINSTEIN.

Notice of filing Bill of Exceptions: Filed April 5th, 1912.

W. H. HARE, *Clerk.*

By F. C. NASH, *Deputy.*

*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division).*

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

No.

### BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the trial of this cause in the Circuit Court of the United States for the Eastern District of Washington, Northern Division, on the 16th day of November, 1911, the Honorable Frank H. Rudkin, Judge Presiding, the plaintiff appeared by E. J. Cannon, Samuel Edelstein and Robert Weinstein, his attorneys, and the defendant, appearing by W. W. Hndman, its attorney, and the following evidence introduced and the following proceedings had, being all the evidence introduced in said cause, and all the proceedings had therein, to-wit:

Before any evidence was introduced the parties hereto entered into a written stipulation and filed the same with the Clerk of this Court waiving the trial by a jury and agreeing that the case could be tried by the Court without a jury.

Mr. CANNON: I think possibly a short statement of the facts would be proper, probably eliminate some further testimony.

It seems that Jacob Miller, who was doing business

here in Spokane and had been for several years, finally entered into some sort of an arrangement to put in a department store at the little town of Camden, up the country, and he started out—I am going to state now the matters in defense as well as the other, so we will grasp the situation from the first. There was when he first went to Camden a two-story frame building, and he planned to enlarge that and put in a stock of goods and do business up there; he had a farm near there, and he was going to handle this farm and the department store at the same time. It seems that he conceived the idea perhaps early in October; he had been doing business with the insurance companies here in town for a long time, and they learned of the fact—we expect to prove when it becomes necessary to tender that proof, if it shall become necessary, that when the insurance companies found that he anticipated enlarging his building they came to him and asked for more insurance, and finally succeeded in getting it.

Mr. HINDMAN: The insurance company, or its local agent?

Mr. CANNON: The insurance company; the Court will understand I mean insurance agent. It was his plan to tear out the side of the two-story building and build on it a one-story lean-to, so that instead of having a store 50x23, I believe it would be 53x50, one big store. With that idea in mind he began work improving the building and repairing it early in October. During the month of October, or the first of November, along in there, the insurance agent came to him for the insurance. We will prove that he stated to them that he was repairing and



improving and changing the building, and they sought his insurance, to be put on in that condition; and later on he made them a draft or plat of the building as it would be finished.

On November 18th the insurance policies here in question were placed upon the building. We will show that not only the insurance agent saw it, saw the plat, plan and took it with them, but that the inspector of the insurance company came out thereafterwards when the stock was in the store and examined it to find out whether or not the risk was a good one. It seems that the repairs were not entirely completed until just before New Year's. The stock was shipped out from time to time and put in the building; the 2nd day of January, 1911, the place took fire and the property was entirely destroyed. I might say to the Court, because it will appear here in the evidence, that Mr. Miller was charged with arson just after these suits were brought, or about that time, and tried before a jury in the other court and acquitted. That, however, is not in this case, except as it may appear in the evidence, because, of course, it has not been alleged as a defense, I think perhaps it would be the law that the verdict of the jury there in that action would be conclusive upon that question.

The property that was shipped out there, or shipped out just a few days before the fire occurred, some of it I think only three or four days, some of it a month before.

There is another defense set up here outside of the material changes in the building, and that is that gasoline and benzine were stored in the building, and there is some testimony that Mr. Miller will explain as best he

can which would justify the inference that it was in the building, but we have positive testimony that it was not in the building, but was in the other building used as a sort of outside storage room, about a hundred feet away from the building that was burned, and was found there after the building was destroyed, and taken from there to Mr. Miller's farm, and we will have, I think, very satisfactory evidence to that fact.

We will take the position that the clause of the policy prohibiting the employment of mechanics upon the building would avoid the policy undoubtedly if the change were made after the policy was written, but that since the agent knew the condition in which the building was when they wrote the policy, since they knew that we were at work upon the building at that time, that that fact does not avoid the policy, and I think the law will sustain our contention. I think that is all I care to say.

JACOB MILLER, the plaintiff, being called in his own behalf, was sworn and testified:

DIRECT EXAMINATION.

By MR. CANNON:

Q. Mr. Miller, you are the plaintiff in this action?

A. Yes, sir.

Q. I want to ask you relative to the goods that were shipped out there from your store in Spokane, or purchased from dealers here just before the fire, and what you did with the goods when they arrived in Camden?

A. Well, —

Q. And whether or not they were put in the store, or whether they were put elsewhere?

A. No, sir; they was in the store. Every bit of it.

Q. What did you say about that?

A. I say all the goods that have been received over there was right in the store.

Mr. CANNON: Have you the insurance policies?

Mr. HINDMAN: They are set out; we admit the policies.

Mr. CANNON: Do you admit that the premium was paid?

Mr. HINDMAN: Oh, yes; we admit that the premium was paid and the policy issued at the time you have specified.

Mr. CANNON: I think that is all we want to prove by him; you admit the policy and all that.

#### CROSS-EXAMINATION.

By MR. HINDMAN:

Q. Mr. Miller, do you remember what time those goods arrived in Camden?

A. Well, they arrived at certain times; they did not come in all at once, but they all come in at the time that everything was completed; at the fire all the goods was there.

Q. How long prior to that time were they coming in?

A. They was coming in there every day, sometimes twice a day, and so forth; we received goods from one day to the other, pretty near.

Q. Well, for three or four weeks, or a month, before the fire?

A. I don't know; I don't think so. It was they started to come in I think about the last part of November.

Q. The latter part of November?

A. Oh, I think so; during that time or the first part



of November, I couldn't exactly tell you.

Q. And they kept coming in from the latter part of November until——

A. Not the latter part of November, but during the month of November they started to come in.

Q. Now, where were they shipped from—Spokane?

A. Some from Spokane, some from Oregon, some, I think, if I am not mistaken, some of the goods come from the east but I don't think so.

Q. Where did you take them after they came to the depot?

A. Well, the building has been building up, and it has been put in, some of them, and the cars used to stay there two or three days before we put them up, until I make room for them.

Q. They were taken over to the building, were they?

A. Yes, sir; taken over to the building.

Q. During the time that the building was being fixed up?

A. The building was quite fixed up already; the roof was going on.

Q. And you say there was about \$10,500 worth of goods that you claim for?

Mr. CANNON: \$11,500.

Mr. HINDMAN: \$11,500 worth of goods?

A. Something like that.

Q. And they were all taken up to the building at that time as they came?

A. They didn't come up all at once.

Q. But as they came?

A. They didn't come up all at once; they been coming

regular every day, and so forth; they were coming in, they were coming in a little at a time.

Q. Let me understand where those goods were kept; will you draw a little diagram for the Court as to the character of this building?

A. Sure, I will.

Q. As to the building?

A. Yes, sir; I will. This was a two-story building.

The COURT: The old building?

Mr. HINDMAN: Just mark that.

(Witness draws diagram).

A. And the addition was only one story.

Q. And that was what?

A. 30x58; this was 30x58, just the same.

Q. That was 30x58? (Indicating).

A. Yes, sir; this was 30x58, and this was 20x58. It was 50-foot front.

Q. That is, the old building?

A. That is the old building; and then I had took the partition out of here to make one store out of it.

Q. You took out the partition between the old building——

A. Yes, to make one store.

Q. Yes.

A. And then I divided it into sections over here and made shelves all the way round; this part of the building was the grocery. (Indicating on diagram).

The COURT: The old building?

A. All the old part of this side (indicating); and right in this side; that was the door.

Mr. HINDMAN: The door was here? (Indicating).

A. Yes; it was up there, and then I had another building next to that.

Q. Just a moment, now. Now, what did you have; did you have anything in the back part of the building?

A. In the back part of the building was a way to go upstairs from that part; was going from the back part steps that was going to a hallway to go upstairs in the rooming house; there was twelve rooms in this made up outside of that one story.

The COURT: That is, outside of the building?

A. Outside of the one-story building was going steps down below, and was going through here and then going upstairs; one the two-story building was a twelve-room house upstairs to the building.

Mr. HINDMAN: Was there rooms in there?

A. Was there a room in here? (Indicating).

Q. Right where?

A. Right here was a room, in there; another one, this was partitioned off, where the oil was.

Q. This is the oil room? (Indicating).

A. This is the oil room.

Q. Right here was the oil room?

A. Yes, sir.

Q. Marked on here oil room?

A. Yes, sir.

Q. And that was built on there, specially?

A. No, sir; it was a room there; before that it was a kitchen. I partitioned it off and make a room out of that exactly for the storage of oil.



Q. When did you tear down that partition between this building and the old building?

A. As soon as I started putting up the ceiling; we put up that partition right away.

Q. Where did you keep the goods during that time?

A. Right in the center of that building.

Q. During the time the carpenters were working?

A. During the time the carpenters were working on the side shelves and the goods lay right in the middle piled up.

Q. And the carpenters were working around there?

A. The carpenters were working around there.

Q. All the time?

A. All the time working right there for the shelves; the building was pretty near completed; there was the two-story roof on it, and the one-story was a roof like this (illustrating) and the ceiling, and then they put in the roof on top of it.

Q. Wait a minute; did you put any of your goods upstairs?

A. No, sir; I didn't.

Q. What did you do with the upstairs?

A. The upstairs I fixed up. I took the goods out of this store here and put it up and fixed it up as a rooming house.

Q. How long were you engaged in this work about, on this work?

A. From the 18th of October.

Q. How long were you engaged in fixing this addition?

A. Perhaps four weeks; five weeks.

Q. Four or five weeks building that addition there?

A. On this addition here; it was all inside and out, too, at the same time.

Q. In cutting off that——

A. Yes; something like that; I couldn't remember exactly.

Q. I believe you said you commenced on the 18th day of October?

A. On the 18th of October.

Q. And didn't get through—you wasn't through at the time of the fire?

A. We was through, all right enough, yes; we was through, all completed at that time.

Q. How long were you in changing the inside arrangement here; how long were you changing that?

A. It didn't take but one day to take off that partition, that's all.

Q. How long did it take you to fix the upstairs?

A. To fix the upstairs, about three or four days.

Q. Three or four days?

A. It takes that; something like that.

Q. And the majority of the work was done——

A. I had about ten men working there at that time.

Q. You had ten men there building this addition?

A. The majority of the work was all the way around there, not on this building, but all the way around there it was remodeling all the way around; there was no such thing as one building; but it was all the way around there.

Q. How long were you fixing the upstairs?

Mr. CANNON: Just don't ask him leading questions, that's all.

The COURT: He is a party. Proceed.

Mr. HINDMAN: Let me understand this, Mr. Miller; what was done upstairs?

A. It was partitioned off into twelve rooms upstairs.

Q. When you went there was the upstairs just an ordinary—what was it, a hallway?

A. It was one room; a dance hall.

Q. It was a dance hall?

A. Yes, sir; a dance hall.

Q. What did you do to it?

A. I remodeled it all the way around, put a floor in it and put partitions around and painted it, and so forth.

Q. Did you cut up the upstairs?

A. I cut it up, certainly; it was a big room.

The COURT: He cut it up into twelve rooms, he says.

The COURT: You put in twelve rooms up there?

A. Yes, sir; twelve rooms.

Mr. HINDMAN: What were those rooms for?

A. For a hotel.

Q. Do you remember how long you were doing that?

A. Well, it didn't take very long to do that.

Q. How many days; how long?

A. I had about six men working upstairs.

Q. How long?

The COURT: How long did it take, he says.

A. Oh, probably five or six days; something like that.

Mr. HINDMAN: Q. What did you do downstairs in this building down here on this room here, the old building? (Indicating on diagram).



A. It has been during that time remodeling all the way around there upstairs and downstairs.

Q. Now, what work did you do down here; what did you do downstairs?

A. What did I do?

Q. Yes; in the old building?

A. Built on shelves there that time.

Q. Put in shelving downstairs?

A. Yes, sir.

Q. How long did it take you to put in those shelves?

A. I couldn't remember exactly. I put in all the shelving it had been painted, and so forth.

The COURT: About how long did it take you?

Mr. HINDMAN. Q. About how long?

A. Perhaps it took—it was all done that work there in there at the same time.

The COURT: About how many days did it take?

A. I think about the 15th of 17th of December it was complete.

Mr. HINDMAN: Q. I am asking you about this part here. (Indicating on diagram).

A. This was the same building done all the way round.

Q. I understand, but how long were you remodeling that old part of the building? (Indicating).

The COURT: Downstairs?

A. I remodeled all the way around there.

Mr. HINDMAN: Downstairs, I mean?

Mr. CANNON: I think this is the idea counsel——

A. I been remodeling all the way round there.

Mr. CANNON: In other words, he carried on all the

job together.

A. When I put up that second building, your Honor, I took out that partition and remodeled all the way around there.

Mr. HINDMAN: Q. Didn't I understand you to say that the building of the partition there was the principal work?

A. The building of the addition?

Q. Yes.

A. It was the principal work all the way around there. Everything had to be done; I didn't say that one thing was worse than the other one; it had to be remodeled all.

#### RE-DIRECT EXAMINATION.

By MR. CANNON:

Q. You say you began work about the middle of October; is that right? Speak up.

A. About the 18th of October we started the building up.

Q. How many men did you employ the first thirty days?

A. The first thirty days I employed three men, two men, and then I put up two men more, that is four men; and then the goods started to come in and I employed about six men more, about ten men then; there was ten men working there right along.

Q. When did you get the principal portion of it done; when was the bulk of it done?

A. The bulk of it was done, I think, I believe about the 18th, something like that, and between the 10th and 20th of December.

Q. I see.

A. Yes, sir. --

Q. Between the 10th and 20th of December it was practically completed?

A. Practically completed, and then we started to open the stock.

Q. Now, counsel wanted you to say about when the goods were shipped in there.

Mr. CANNON: In other words, I think it is safe to say, counsel, that they were shipped in from November—they were practically all in November 20th and in the store by that time.

Q. They were in the store by that time; is that about it?

A. Yes, sir; that's right; some were out, we had a delay with the goods and there was a day until we got room enough to put them in during that time.

Q. Counsel has examined you about the repairs to the building, so that I will have to go a little further on that line, and I might as well do it now. I want to know if you had any conferences with any insurance agents prior to the 18th of November, and if so, with whom?

Mr. HINDMAN: That is objected to, your Honor——

Mr. CANNON: With respect to these insurance policies?

Mr. HINDMAN: As incompetent, irrelevant and immaterial, and on the further ground that parol testimony cannot be received to vary the terms of a written contract; and the further ground that there is no endorse-



ment on the policy permitting or allowing the improvements.

The COURT: Under the decisions of the Supreme Court of this state the insurance companies, through its agents, having noticed that the building was under construction at the time the policy was issued, I think it is doubtful if you can take advantage of this provision, and I doubt if you can avoid it unless the policy really so provides.

To which ruling of the Court the defendant excepted.  
Exception allowed.

Mr. CANNON: Q. With whom did you have the conversation relative to taking on insurance

Mr. HINDMAN: This goes in under the same objection.

The COURT: All subject to the same objection.

Mr. HINDMAN: Subject to the same objection, and with our exceptions allowed.

The COURT: Yes.

Mr. CANNON: Yes; I think that is the best way.

Q. With whom did you have your first conversation?

A. My first conversation was with a man by the name of Poole.

Q. Mr. Poole?

A. He was an insurance man.

Mr. HINDMAN: We will object to that.

A. He was the agent.

The COURT: This was a conversation with the agent of this company, I presume?

Mr. CANNON: Yes; we will have to connect it up; we will have to do that, of course.

A. So I proposed to him that I was gonig to build a

store, that store at Camden, so that he was come in early in October; he come in and he wants to get that insurance for Rogers & Rogers.

Q. For Rogers & Rogers?

A. Yes, sir; so however I told him I am not. I was not ready to give any insurance at all. I build my building first up; so he takes a pencil and he tells me how the building will be; first thing you know he takes insurance \$2,500.

Mr. HINDMAN: When was this you are speaking of?

Mr. CANNON: Early in October.

A. The first thing he wanted me to take out \$2,500, and then I told him I am going to build a general merchandise store up there, and he was anxious to get that insurance business, but I tell him I will not give any insurance until I build up my place first, I am not anxious enough for that; and he started to come in day after day every week and ask me that question; he takes a pencil and I showed him how I was going to build up that place.

Q. And you showed him what you were going to build up there?

A. I showed him what I was going to build there; all exactly what I showed him.

The COURT: Who was this conversation with?

Mr. CANNON: Poole.

A. Poole; he was the agent, the insurance man.

Mr. HINDMAN: Of course, we are objecting to this on the ground that there is no agency shown, and unless you can connect it up it will be immaterial.

Mr. CANNON: I have got to begin at one end or the other end.

Mr. HINDMAN: That is all right.

The COURT: He has got to be shown to be the agent.

A. So, however, I was always putting him off from one day to the other, and he started to come in and come in, and he says he would like to have that insurance; well, I knew Mr. Rogers for many years before and I told him if Mr. Rogers himself will come in, and if you want to go out to Camden to look over there, look that building over and what business I am going to open up, that's the time I am willing to give you some insurance, let him do that, so he came in one day to my hotel—I keep a hotel, the Roslyn Hotel—he and Mr. Rogers they came in to me.

Q. That was Mr. Rogers of Rogers & Rogers?

A. Of Rogers & Rogers.

Q. What is their business?

A. Insurance people.

Mr. HINDMAN: They are not the agents of this company at all.

Mr. CANNON: We will connect it up.

A. He told me after he asked me and after all the agents has come, "It is not my business; they issued the insurance; that is all the policy is and what I was looking at and what I paid him for; he collected the money, nobody else.

Q. Never mind, we will prove all that; go on and tell all about the conversation.

A. So Mr. Poole brought Mr. Rogers to my hotel and I had quite a lot of talk with him and he said, "Mr.



Miller, I have known you for a good many years and I don't think it is necessary to go to the expense to send somebody over to Camden to look over that building and look over what business you are going to open up because your word is good enough and the plans are good enough. I think we will give you that insurance any way." I showed him exactly how I wanted to build it. I says, "I am not in a hurry, but one thing I want to be sure; you can yourself go or send anybody you want to, to look it over after I get started in the store, and that's the time I will issue your insurance and at the same time he took it for me, \$4000 of insurance over in my store over here.

Mr. HINDMAN: What was this?

Mr. CANNON: That \$4000 on the store over here I dont' care about.

A. But it was transferred afterwards.

Mr. CANNON: It is not one of these policies here.

A. No, sir; you are right; it has been changed afterwards.

Q. Was it changed afterwards?

A. It was changed afterwards; yes, sir.

The COURT: Lead the witness so as to keep within proper limits.

Mr. CANNON: I guess I will have to.

Q. Now I want you to say who you drew that plat for?

A. For Mr. Poole and Mr. Rogers.

Q. What did they do with it?

Mr. HINDMAN: Mr. Poole and Mr. Rogers, is that what I understand?

A. Yes, sir; Mr. Poole is the agent of Rogers and Rogers.

Mr. HINDMAN: The agent of Rogers?

A. Yes; he is insurance man.

Q. Who brought you these policies; after they were written?

A. Well, I think, if I am not mistaken, that Mr. Poole brought them, or that gentleman that died, what do you call him, I couldn't remember that name, that insurance man that was working at Rogers' place, the head man he died about six months ago.

Mr. CANNON: Wiedenbacher?

A. Wiedenbacher; yes, sir; that's the gentleman; he brought most of the insurance policies to me; and that money when it was coming due I paid it up to Rogers' office; they collected that.

Mr. CANNON: This is the Spring Garden case we are trying, isn't it?

Mr. HINDMAN: Yes.

Mr. CANNON: Q. I will ask you if this policy that I show you is the one that was delivered to you?

A. Yes, sir; yes, sir; that's the one.

Q. I noticed "Rogers & Rogers, Real Estate and Insurance" here?

A. Yes, sir; that's so; exactly.

Q. I think I will have this marked as plaintiff's exhibit "1" (policy so marked). I show you plaintiff's exhibit "1," and I will ask you if this is the insurance policy on which this suit is brought?

(Hands witness exhibit "1").

A. Yes, sir; that's it.

Mr. CANNON: I offer this in evidence with the endorsements on the back.

Mr. HINDMAN: I would suggest, Mr. Cannon, so as not to encumber the record, to read the endorsement; we have admitted the policy, in the answer.

Mr. CANNON: "Real estate, rentals, insurance; Rogers & Rogers, Spokane, Washington," appears endorsed upon the policy, together with the date of the policy, the date of the expiration, and the nature of the stock insured, the name of the party insured and the name of the insurance company, and also Pacific Northwest Department, Burgard and Strout, General Agents, Seattle and Portland, with a slip attached a memorandum slip inside, a typewritten slip, signed by Chester H. Harvey, by some other Harvey.

The COURT: Let that appear in the record.

Mr. CANNON: At this time, counsel, I serve notice on you—I have got an order here, that you produce those papers set out in that motion; have you got them?

Mr. HINDMAN: Yes, sir; there they are right there.

(Hands papers to Mr. Cannon).

Mr. CANNON: You haven't got them all.

Mr. HINDMAN: I have gotten everything the insurance agent told me we have, and everything our local agents told me we have; I think you will find the diagram on there that he mentioned.

Mr. CANNON: I will offer this—no, I won't offer this just yet until I get the witness who made it out; I think perhaps that is all for this witness right now.



## RE-CROSS EXAMINATION.

By Mr. HINDMAN:

Q. I believe you testified you had a map or plan of the building up there?

A. Yes.

Q. You did have these plans?

A. Have what plans?

Q. The plans made by the local agent?

A. No, sir; I didn't. I didn't say that at all.

Q. You didn't draw any map or plan?

A. He drew it himself.

A. He put it right down in a book he had; he had a little book in his pocket and he wrote it down himself; I didn't draw any plans at all.

Q. Did he write it down at that time?

A. I didn't pay no attention much; he take a plan of that building and take off the stock of goods.

Q. Didn't I understand you to say you drew a plan?

A. I didn't say so; you are mistaken.

Mr. CANNON: I think I said that in the opening to the Court.

A. If you did you are mistaken a little.

Mr. HINDMAN: I think you stated that he wrote it down, wrote it out?

A. No, sir; I don't know—

Mr. CANNON: Wait until you find out what he is asking you before answering.

Mr. HINDMAN: Didn't I understand you to state to the Court that the local agent here at your instance and request drew out the amount and character of improvements you were going to make up there?

A. No, sir; he didn't; he come when everything was completed over there, he simply looked it over there.

Mr. CANNON: Wait one moment now; the counsel is asking about the agent here.

A. What agent?

Mr. CANNON: The one you first got your insurance from.

A. Oh, excuse me, I thought he was talking about the agent at Seattle; you mean this agent over here, Mr. Poole?

Mr. HINDMAN: Q. You got this from Mr. Harvey, didn't you?

A. No, sir; I got that from Mr. Rogers.

Q. I mean—

A. The policies?

Q. The policies?

A. That's all right; Mr. Rogers he furnished me those policies; I don't know where he got them or what he got them.

Q. You didn't know where he got them?

A. I didnt' take no attention to it much, because I know Rogers was already in business in town and that he was responsible, if he issued policies they was good.

The COURT: Mr. Witness, can you answer the question asked without talking so much?

A. All right.

Q. You say you got this from Mr. Rogers?

A. Yes, sir.

Q. Who did you say that you told of the character and condition of the building that was going up there?

A. Mr. Poole.

Q. Mr. Poole of Mr. Rogers' office?

A. Yes, sir.

Q. Now as to this insurance then, did you tell Mr. Poole what kind and character of work you was going to do up there?

A. Yes, sir.

Q. And did you have him draw a plan?

A. I drew him the plan.

Q. You drew him a plan?

A. He drew it himself.

Q. He drew it himself?

A. Yes, sir; and I drew one.

Q. And you drew one?

A. Yes, sir.

Q. When was that plan drawn?

A. Drawn on first time he give my insurance on that building, \$2500 on that two story building; the second time I drew the plan.

Q. Was that the plan that was drawn?

(Hand witness paper).

A. I did not draw that.

Q. That plan there?

A. I didn't draw that.

Q. Was that the plan that he drew in your presence?

A. He drew it himself.

Q. Did he draw that himself?

A. I don't know.

Q. Was that the plan that was drawn by him in your presence?

A. I couldn't tell you he was drawing a plan himself in his own book.



Q. But do you know whether that was the plan or not?

A. I couldn't remember.

Q. Did you see him drawing the plan?

A. Sure.

Q. You were standing there when he drew it?

A. Sure I drew myself a plan.

Q. You were standing there when he drew it?

A. Yes, sir.

Q. That was prior to the issuing of the policy?

A. The issuing of the policy and whether you are going to take insurance on that or not.

Q. Now you are familiar with that, is that the one you saw him draw?

A. I don't remember that business, I couldn't remember.

Q. You don't remember?

A. No, sir.

Q. You don't remember whether that was the one or not?

A. I know he drew a plan, but I couldn't remember.

Q. You don't remember whether that was the plan or not.

A. I couldn't tell you.

Mr. HINDMAN: I offer this in evidence as defendant's Exhibit "A."

The COURT: It will be received.

Mr. HINDMAN: I would like to have Your Honor see this.

(Exhibit "A" passed to the Court).

Mr. CANNON: We will have that properly intro-

duced and identified and then the Court will have it.

Mr. HINDMAN: Very well.

Mr. CANNON: I think the party is here.

The COURT: Anything further with this witness?

By Mr. HINDMAN:

Q. As I understand you, you made application to Rogers & Rogers for insurance, or they came to you, it don't make any difference?

A. They came to me.

Q. And you told them you wanted so much insurance?

A. I didn't tell them that I didn't want insurance hardly at all when they come to me I refused the insurance until I got my place fixed up complete.

Q. Until you got your place fixed up complete?

A. Yes, sir.

Q. Now then did they tell you that they would issue the entire policies in their own company?

A. They didnt' tell me nothing at all, they didn't tell me they would issue policies from their own company, or some other company, I didn't care about it; I told them for one thing, I says I want you to issue policies in responsible companies.

Q. You told them to issue policies for you?

A. I told them that if I made up my mind to give them that insurance they would get it.

Q. You told them to get the policy out for a certain amount?

A. I didn't take a certain amount at once, so I didn't care to take any policy.

Q. After you came to the conclusion you wanted the

insurance—

A. I took them out that time—

Q. Wait a minute; wait a minute; you told them you wanted so much insurance, is that correct?

A. Well I took—

Q. Answer the question.

Mr. CANNON: Let him answer it right; if he cannot answer it “yes” or “no.”

A. I don't think I make any proposition about any amount; I didn't talk to him at all about the amount at all.

Q. Did you tell him how much insurance you wanted?

A. He issued a \$2000 policy and a \$1000 policy at that time according to the goods over there, and when the goods was complete that was all the policies there was they wanted to get some more policies and I refused, then—

Q. Wait a minute, I am trying to get at the facts here.

Mr. CANNON: He has answered the question.

Mr. HINDMAN: Wait a moment now.

Mr. CANNON: But he is answering the question.

Mr. HINDMAN: Q. You left it with them then to insure your property, as I understand it, in the amount of these policies that they afterwards issued?

A. I didn't leave it exactly or any one, didn't want them to give me insurance, I refused to have entirely to have any policy until it was completed, but next time when Mr. Rogers was in I talked a little at that time, and he says I don't want you to give anybody else a



chance to insure you, and I did talk it a little about a policy.

Q. The only parties you had any conversation with with reference to this matter was Rogers & Rogers or their agent?

A. I don't know nothing about them whether agents or holders in that business or not.

Q. Well, did you talk with any other parties?

A. I said Rogers and Rogers, very well; they are insurance people.

Q. Let me get this question again; as I understand you then, you dealt with Rogers and Rogers, or the people in their office?

A. I dealt with Rogers and Rogers, and I dealt with the agents of Rogers and Rogers, they was the men issuing, of course, the policies, that is what I expected.

Q. You told Rogers and Rogers, or the agents of Rogers and Rogers to take out insurance for you after you had come to the conclusion you wanted insurance?

A. When the agents come to me, when Rogers come to me, he took it himself.

Q. Is that correct?

Mr. CANNON: I object to that, the witness has gone over it a dozen times.

Mr. HINDMAN: If you will make this admission, Mr. Cannon, if you will say that this is the fact, I will quit the cross-examination; do I understand that his dealings in getting this insurance was entirely with Rogers and Rogers, or the agents of Rogers and Rogers; I mean in taking out the insurance.

Mr. CANNON: Why it was with Rogers and Rogers, or Rogers and Rogers' employees.

Mr. HINDMAN: Well, that is what I want.

Mr. CANNON: Who negotiated the insurance for him?

Mr. HINDMAN: That is all.

The COURT: You may stand aside.

Witness excused.

Mr. HINDMAN: In order to save the record I move to strike out the testimony in reference to the Spring Garden Insurance Company, for the reason that the parties have no authority whatever to represent the Spring Garden Insurance Company; that Rogers and Rogers were acting as agents for the plaintiff in this case.

The COURT: The motion will be overruled for the present; it may become competent hereafter. To which ruling of the Court the defendant then and there excepted. Exception allowed.

(Testimony of James Harlin Poole.)

JAMES HARLIN POOLE, a witness called upon in behalf of the plaintiff, was sworn and testified:

DIRECT EXAMINATION.

By Mr. CANNON:

Q. What is your full name?

A. James Harlin Pool.

Q. What is your business?

A. Real estate and insurance.

Q. What were you doing during October, November and December, 1910?

A. I was working for Mr. Rogers at that time.

Q. Are you the person who had the conversations with Mr. Miller relative to the insurance policies.

A. Yes, sir; at different times.

Q. When did you first see him?

A. Well, I saw him, you might say, on the insurance all fall at different times preceding that time and after such time.

Mr. HINDMAN: As I understand it, this testimony goes in under the same objections also?

The COURT: Yes, sir.

Mr. CANNON: Q. When did you first learn that he was improving his building in Camden, or changing it?

A. Well, from the time that he went up there to start in business, or along about such time, in October I think it was.

Q. How long prior to the issuance of the policy do you think it was?

A. It was some time, perhaps a couple of months, two months or such a matter anyway.

Q. Later on and prior to the issuance of the policy did you have any conversation with him relative to remodeling the two story building?

A. Yes, sir; that is an addition to the old building.

Q. State whether or not he drew you a plan of it?

A. Yes, sir.

Q. Or a rough sketch, I mean?

A. Yes, sir.

Q. And about what was the scheme, if you can tell us, that he gave to you?

A. Which, the size and dimensions of the building?

Q. Yes; and the changes that were to be made?

A. The dimensions of the building, I don't just re-



member, but you stated them, and he stated them as near, I think, as I remember them.

Q. That is approximately fifty-three feet long, or fifty-eight feet long?

A. Something about that; yes, sir.

Q. And about fifty feet wide when completed?

A. Yes, sir.

Q. Did he tell you whether or not he was working upon the building?

A. Yes, sir.

Q. What did he say?

A. He said he was at work building an addition to the store and also at work upstairs making rooms of it, putting in shelving in the old building, and doing general carpenter work all through the structure.

Q. Did he tell you this before the policies were gotten out?

A. Yes, sir; some time.

Q. Tell us what conversation you had with him relative to getting out the policies and as to whether you and Mr. Rogers saw him together?

A. Yes, sir; his statement is correct as near as I can remember, in that respect.

Q. Tell us what the facts are?

A. We went over and solicited his insurance and he wouldn't give it to us at that time on the building or on the stock up there; he said that he wasn't ready, and we didn't write the insurance then, he guessed he wouldn't take it, he said he wouldn't take it until we went up and looked at the building and all over.

Q. Did Mr. Miller solicit insurance from you and

Mr. Rogers, or did you solicit Mr. Miller.

A. We had to work for it to get it.

Q. Did he suggest the amount of insurance that he would carry, or did you get as much as you could get?

A. I got as much as I could; in fact, I knew about what he was shipping up there, and we gave him what we considered would protect him well.

Q. Now I call your attention to defendant's exhibit "A," and ask you if you ever saw that paper before?

A. I would like to make a little statement; Mr. Weidenbacher and I took this last insurance together; he had the management and attended to the business in general; I was more of a solicitor, then; I didn't attend to the insurance business; I turned all my slips and all my diagrams and everything over to Mr. Weidenbacher.

Q. Is he alive now?

A. No; he used to be head man for insurance in Rogers & Rogers' office, and he said he will attend to it.

Mr. HINDMAN: We object to that; Rogers & Rogers have nothing to do with this.

Mr. CANNON: I will ask you if you know that handwriting?

(Shows paper to witness).

A. I think that is Mr. Harvey's writing; he made that out himself.

Q. Speak up loud, so that the rest of us can hear you.

The COURT: What was your answer?

A. I believe that is Mr. Harvey's writing—he is back there—I think he made out this slip, it was from their office, brokered from their office, it came from

Harvey's office in Rogers & Rogers' office, it came from there and they made out the policy for the company.

Q. Tell us what you mean by brokered through this office; this insurance business is out of my line?

A. I may not make a good explanation of it; but I know where we had insurance on a building and practically all that the company would care to carry, so it is, as a rule, when we have all the insurance your companies can carry you would go to your neighbors and get them to write the insurance back and forth, and divide the insurance up; that is all I can say about that.

Q. Did you ever have any talk with Harvey relative to this insurance?

A. Not myself.

Q. Did you ever receive any papers from Harvey, policies or otherwise?

A. The office only; Mr. Weidenbacher attended to the policies and delivered these policies; attended to the whole thing.

Q. Where did the policies come from?

A. Part of them came from Mr. Harvey.

Q. This policy here is from that company?

(Hands witness paper).

A. It came from Mr. Harvey, Chester H. Harvey signed it.

Mr. CANNON: This is only a copy, counsel, have you the original?

Mr. HINDMAN: No, that is the only one we ever had.

Mr. CANNON: I asked for the original; this copy



is part of your company's records; do you offer this in evidence?

Mr. HINDMAN: No.

Mr. CANNON: I ask for the original. This is a part of your company's record, is it?

Mr. HINDMAN: Yes, sir.

Mr. CANNON: I will offer Defendant's Exhibit "A" in evidence.

Mr. HINDMAN: All right, sir.

Mr. CANNON: As Plaintiff's Exhibit 2.

The COURT: Very well. It will be received and so marked.

Mr. CANNON: I think that is all.

#### CROSS-EXAMINATION.

By Mr. HINDMAN:

Q. As I understand it then, Mr. Miller after he had come to the conclusion to take out this insurance told you to look after it for him?

A. Yes.

Q. And he told you the amount of insurance he wanted to carry on this property up there; is that correct?

A. Yes, sir; that is, we agreed on the amount.

Q. You agreed on the amount, and he told you to cover it for that amount?

A. Yes, sir.

Q. You put in the amount in your companies that you represented; or what companies did you represent?

A. We had the Glen Falls, the Milwaukee and Mechanics and Fireman's—

Q. I don't care what you represented, but what par-

ticular companies did you represent that you put on this loss?

A. I just wrote out the application and gave it to Mr. Weidenbacher, and he placed this with Mr. Harvey's firm, I believe it is.

Q. Did your firm, or the men that you represented, put any insurance upon this property at all?

A. Well, we attended to the business; that is, we obtained the policies, and Mr. Weidenbacher delivered them.

Mr. HINDMAN: Q. Who were you agent for; who did you represent?

A. I was working for Rogers & Rogers.

Q. Did Rogers & Rogers put on any insurance on this property, in companies they represented?

Mr. CANNON: That is, if you know?

A. Yes; we had all we could carry; we had the building insured; it is paid for.

Mr. HINDMAN: Q. After he told you to insure the property you went to these other parties to get it?

A. Yes, sir; when our companies couldn't carry any more, we put it with Mr. Harvey's.

REDIRECT EXAMINATION.

By Mr. CANNON:

Q. Then as a matter of fact you were an insurance solicitor, and when you got all that your companies would carry on the property you went and got somebody else, and you got your commission for it?

A. Yes, sir.

Q. From whom; Mr. Miller or the other fellow?

A. Through Mr. Rogers.

The COURT: How does the name of Rogers & Rogers happen to be on the back of all these policies if they were not agents; do you know?

A. I don't know why that was; I didn't attend to that part of it.

The COURT: It is printed upon the back of these policies, isn't it?

Mr. CANNON: It is a sticker put on.

Mr. HINDMAN: It is customary, as I understand it, for one party who handles the insurance to farm it out; they are responsible and take the credit.

A. This insurance is on record at Rogers & Rogers' as a matter of fact because that was the policy that come through Mr. Harvey.

Mr. CANNON: Q. In other words, the general agents of the companies, if they find a man who wants insurance they get all his insurance, if they can?

A. Yes, sir.

Q. And what they cannot carry in their own company they turn over to the general agent of the other company and he issues the policy, is that it?

Mr. HINDMAN: You mean the local agent?

A. Local agents; yes, sir.

Mr. CANNON: The agent of the other company?

A. Yes, sir.

Q. And the other fellow, the other company, if he gets more than he can carry, he reciprocates and turns it over to your company?

A. Yes, sir. ,

Q. Isn't that the general and universal custom amongst insurance companies all over?



A. It has been all the time for the last five years that I have been writing.

RE-CROSS EXAMINATION.

By Mr. HINDMAN:

Q. You mean that you have certain companies here, or certain agents here, which you reciprocate with?

A. Yes, sir.

Q. And when you have insurance in Spokane, Washington—you were an insurance agent here—that you could not cover, you went to another insurance company and took out the policy?

A. Yes, sir.

Q. You don't know anything about the general, universal custom?

A. No, sir.

That is all.

Mr. CANNON: Do you dispute that custom?

Mr. HINDMAN: I am asking the witness here.

Witness excused.

(Testimony of Chester H. Harvey.)

CHESTER H. HARVEY, a witness called upon in behalf of the plaintiff, was sworn and testified:

DIRECT EXAMINATION.

By Mr. CANNON: ,

Q. Mr. Harvey, you are the agent here, I believe, for the Spring Garden Insurance Company?

A. Not now.

Q. Well, you were then?

A. I was at the time the policy was issued.

Q. Well, you were paid for these policies when they were issued, were you then, or afterwards?

A. How is that?

Q. Were you paid for the policies, were you?

A. Paid for it?

Q. Yes; who paid you?

A. Rogers & Rogers' office.

Q. You didn't perhaps bring along with you the date so you don't know when they were paid, and I don't care particularly about that now. Did you know Rogers & Rogers some time before this policy was written?

A. Did I know them?

Q. Yes.

A. For seven years.

Q. Seven years; and did you exchange insurance policies with them from time to time?

A. To some extent.

Q. How long did that custom continue to the extent that it was carried; how many years?

A. I couldn't state that.

Q. Well, a couple of years, maybe?

A. Possibly.

Q. You have some arrangement with them, have you, for doing business that way?

Mr. HINDMAN: Of course this is all objected to; it goes in under the same objection, incompetent and immaterial.

The COURT: Yes, the same ruling.

Mr. CANNON: Q. You had it until when, I say how long had it continued; when did that arrangement terminate?

A. When Rogers & Rogers resigned from the local board of fire insurance agents.

Q. Now I call your attention to plaintiff's exhibit "2" and ask you to examine that and let us know if you ever saw that before, or if it is a copy of something you prepared? or something you had in your possession?

(Hands exhibit to witness.)

A. I never saw it before to my knowledge.

Q. How does your name come to be attached to it?

A. Why, I presume it was put on with the typewriter.

Q. Is this a copy of a paper that you prepared?

A. Well, I presume it is; looks very similar to it.

Mr. CANNON: I asked him for the original and now he has sprung a copy on me here.

Mr. HINDMAN: We haven't the original.

Mr. CANNON: Well, will you admit that this is a copy of the original mentioned?

Mr. HINDMAN: The only thing I know of it is that I inquired of the insurance company and they sent that pursuant to your motion.

Mr. CANNON: Q. Go ahead; whose writing is on the back there, do you know? I suppose when papers go out of your office with your signature, you attach your signature to them, do you?

A. Yes, sir.

Q. Then your best judgment is that this is a copy of the paper that left your office?

A. I presume it is.

Mr. HINDMAN: We will admit that, that part of it.

Mr. CANNON: You admit that you have the original, but it is elsewhere?



Mr. HINDMAN: I don't know, I admit that is a copy.

Mr. CANNON: Well, I don't care as long as this is a copy.

Q. Who prepared the original of which this is a copy.

A. How is that?

Q. Who prepared the original of which this was a copy?

A. The general agents of the company.

Q. And who were those?

A. Burgard & Strout.

Q. And what was your title with the company; what office did you hold?

A. Resident agent.

Q. Where would the information be gotten to supply the date in order to make that drawing?

A. The information that this was gathered from was supplied from a rough sketch of Mr. Weidenbacher, of Rogers & Rogers' office.

Q. Then Rogers & Rogers' office got you this insurance.

A. Yes, sir.

Q. And got you the pay for it?

A. How is that?

Q. And got you your money for the insurance?

A. Yes, sir.

Q. And got you other policies from time to time, I suppose?

Mr. HINDMAN: I object to that as incompetent, irrelevant and immaterial.

The COURT: It goes to show the custom, that is all.

Mr. CANNON: Yes, sir.

Mr. HINDMAN: Exception. Exception allowed.

Mr. CANNON: They got you other policies also from time to time?

A. From time to time; yes.

Q. And you got them some from time to time?

A. No, I don't think so.

Q. You don't think you ever reciprocated, but you were willing to take what they handed you?

A. Some of it.

(Testimony of Charles H. Rogers.)

CHARLES H. ROGERS, a witness called upon in behalf of the plaintiff, was sworn and testified:

DIRECT EXAMINATION.

By Mr. CANNON:

Q. What is your name?

A. Charles H. Rogers.

Q. You are a member of the firm of Rogers & Rogers?

A. Yes, sir.

Q. What is your business?

A. Real estate and insurance.

Q. And were you engaged in the insurance business in October, November and December of last year?

A. We were.

Q. Do you know Mr. Miller, the plaintiff in this action—stand up, Mr. Miller (Mr. Miller stands up), so he will see you?

A. Yes, sir.

A. And you remember having some conversations

with him relative to insurance when he was about to move out to Camden, Washington?

A. Yes, sir.

Q. Do you remember the date, approximately?

A. No; I do not.

Q. The testimony is that it was some time in October. The policies were issued November 17, 1910; now how long prior to the issuance of the policies did you have your conversation with him relative to the insurance?

A. I don't know that I had any conversation myself, with Mr. Miller.

Q. Have you a brother in the business also?

A. Yes, sir.

Q. The gentleman suggests that the conversation you had was quite a while before that and originated on the farm property?

Mr. HINDMAN: This class of testimony, of course, is objected to; it is not necessary for me to object to this class of testimony.

The COURT: No, no.

Mr. CANNON: Not until we get somewhere.

A. I would like to have the question read.

Mr. CANNON: Q. I will tell you. The idea is this: There is some testimony here to the effect that before this insurance was written Mr. Miller told you that he was making improvements upon his property in Camden and was going to put in a store there, and that either you or your brother, I don't know which it was—well I think I can get at it in another way; you remember, don't you, writing the insurance policies on his prop-



erty which I show you; I show you several of them?

A. I have no knowledge of these policies here. (Examining policies handed him by Mr. Cannon.)

Q. You remember writing Mr. Miller some insurance?

A. There was some written through our office here that I remember of.

Q. Who represented you in your business in the office, who did your soliciting of insurance for you?

A. Our insurance manager at that time was Mr. Weidenbacher.

Q. And what about Mr. Poole?

A. Mr. Poole was in our employ and I believe that Mr. Poole handled this Miller insurance himself.

Q. But, Mr. Rogers, what was the custom of the city, or your custom; in other words, how did these policies get into the hands of the Harvey agency; I call your attention to the Spring Garden Insurance Company, coming through your office signed by Mr. Harvey as agent; how is that business conducted?

A. Why, we brokered the business through the Harvey agency, an exchange of business.

Q. What do you mean by brokering the business through? Is that more or less of a custom?

A. Yes, sir.

Q. To what extent is it done?

A. Why, it is a general custom to broker business back and forth with the agents.

Q. And in doing so where do you get your pay for your work?

A. We get part of the commission and the broker

gets a part of it, or the agent that writes the business gets part of it and the agent that places it gets part of it.

Q. I see; then if you write the business and turn it over to the Spring Garden Insurance Company you get a part of the commission and Mr. Harvey gets the balance?

A. Yes, sir.

Q. Then whom do you represent in that work—but I guess that would be a legal conclusion, anyway.

The COURT: I think so.

A. We represented the assured if we placed it out of our office.

Mr. CANNON: Q. How?

A. If we brokered the business for another agent we usually represent the assured.

Q. Now I call your attention—I had withdrawn the question before you answered it anyway, because I think that also is a legal conclusion.

Witness excused.

FRED A. STOLZ, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. CANNON:

Q. State your name?

A. Fred A. Stolz.

Q. What is your business?

A. Adjuster of the Spokane Merchants' Association.

Q. And was so employed in January, 1911?

A. I was.

Q. (Handing witness paper marked for identifica-

tion Plaintiff's 3) Did you ever see this check before?

Mr. HINDMAN: We want to make the objection that there is no plea of estoppel and consequently it is incompetent under the pleadings.

Mr. CANNON. You have denied it. You can't come in now and admit it and shut us out of the proof. I don't know that I ought to assert it that way.

The COURT: It will be admitted subject to the objection.

Mr. HINDMAN: We did admit payment of the premiums.

Mr. CANNON: Except perhaps by denying it.

Q. Whom did you deliver that check to?

A. To the office of Rogers & Rogers.

Q. What is it for, do you know?

A. It was for the insurance premiums that were due on the Miller policy.

Q. Miller's policy, which you held at the time?

A. That I held at the time; yes, sir.

Q. Are these the policies, that I hand you?

A. Yes, sir.

Q. The policies then that you paid for are the policies that you hold in your hands?

A. This was the balance that was due, this check here.

Q. Now, the policies you hold in your hand are numbered as follows, are they not: No. 29446, Seaboard Fire & Marine Insurance; No. 29447, Seaboard Fire & Marine Insurance; No. 7349, Spring Garden Insurance Company; No. 3791, Hamburg-Bremen Fire Insurance Company, of Hamburg, Germany, and No. 125927 of



the Pittsburg (Pa.) Insurance Company; those are the policies?

A. Yes, sir.

Q. And these policies were turned over to you after the fire by Mr. Miller?

A. They were.

The COURT: I don't find any issue in the pleadings which would warrant proof of the fact.

Mr. CANNON: It is proof as estoppel after they have put in their other testimony.

The COURT: Don't you have to plead an estoppel?

Mr. CANNON: You don't have to plead a waiver, I guess; we have plead a waiver. A waiver is worse than an estoppel.

Now, I offer the check in evidence.

Mr. HINDMAN: I object as irrelevant, incompetent and immaterial on the grounds specified here before.

Mr. CANNON: I take it we have plead a waiver, and a waiver may be proven by most anything.

Mr. HINDMAN: I presume it will be admitted subject to the objection?

The COURT: Yes, sir.

The check offered is received in evidence and marked PLAINTIFF'S EXHIBIT 3, and the same is hereto attached and made a part of this bill of exceptions.

Mr. CANNON: If we have not, I am going to ask to amend. It cannot be a surprise to them.

Mr. CANNON: I want to publish the deposition of John Davis in this case. May I open it?

The COURT: Yes.

Thereupon plaintiff rested his case.

Thereupon the defendant, to sustain the issues on its behalf, introduced the following evidence and the following proceedings were had, to-wit:

Mr. HINDMAN: Will you admit that E. J. Lake on the 26th, 27th, 28th and 29th of March, 1911, was a Notary Public for the State of Washington, in Spokane County?

Mr. CANNON: If he says so. He is here. Is that a fact, Mr. Lake?

T. J. LAKE: Yes, sir.

Mr. HINDMAN: And that the plaintiff signed and swore to the statement I have here?

Mr. CANNON: I will admit that he gave testimony on or about the date you have there; I was not in that proceeding.

Mr. HINDMAN: But that that is the signature of the Plaintiff Miller?

Mr. CANNON: I will admit that Mr. Miller's signature is attached to Page 65 of the paper that counsel shows me.

Mr. HINDMAN: And also on page—he signed it twice—on Page 59?

Mr. CANNON: Also on Page 59.

Mr. HINDMAN: We now offer this sworn statement in testimony.

Mr. CANNON: Objected to as irrelevant, incompetent and immaterial for two reasons: One reason is that Mr. Miller is present in court, was on the witness stand and has not been examined as to the truth of that statement, whatever it is. Is that a deposition?

Mr. HINDMAN: No; it is a sworn statement taken

under and by virtue of the terms of the policy, where he was subpoenaed to appear and submit to examination under oath; not on a deposition, but simply his admission as against his interest.

Mr. CANNON: Objected to as irrelevant, incompetent and immaterial, the plaintiff in this action being in court himself.

The COURT: That rule has no application to an admission against interest. So far as it relates to that, I will admit it.

Mr. HINDMAN: Before I read this I will offer it in evidence.

The COURT: I don't know what it contains; if it contains any admissions against interest within the issues of the case, it is competent; that is all I rule on now.

Mr. CANNON: I don't know what it contains, only I think I know what counsel is driving at, but I have not read it.

The statement is marked Defendant's Exhibit AA.

Mr. HINDMAN: I will read that part in just a moment. I will call Mr. Folger to the stand first.

W. P. FOLGER, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. HINDMAN:

Q. You were were the Adjuster for the Insurance Company, the defendant in this case, were you not?

A. Yes, sir.

Q. Were you present at a hearing on the 27th of March, 1911, wherein the statement of Mr. Miller was taken down?



A. Yes, sir.

Q. What statement, if any, did he make with reference to having gasoline in the building?

Mr. CANNON: I object to the question as not impeaching testimony, incompetent and immaterial.

Mr. HINDMAN: It is not impeaching testimony; it is proving our case, that he had gasoline in the building.

The COURT: It is in the nature of admissions, not impeaching testimony at all; admissions against interest.

Mr. CANNON: It depends upon the circumstances under which it was made.

The COURT: You may answer.

A. He testified that he had gasoline there in the building.

The COURT: The statement is in writing; I don't see the necessity for swearing to a part of it.

Mr. HINDMAN: The testimony don't show what I want to call out.

The COURT: Very well.

Mr. HINDMAN: Q. Did he point at that particular time out the place where he kept the gasoline and the turpentine?

Mr. CANNON: Objected to as leading, incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. He made a diagram of the building showing the room that was set apart for the oils.

Q. Have you noticed this diagram this morning?

A. Yes, sir.

Q. Can you say where he stated or pointed out that the oil was, gasoline or oil?

The Court: (Indicating diagram). This is the old part and this is the new, and this is the stairs that went up behind.

A. I don't know which way it faces.

Mr. HINDMAN: Q. State whether or not it was in what was termed the oil room?

Mr. CANNON: Again, it is leading.

The COURT: Yes, I think it is leading.

A. I can get the direction, if you can, from this. I should say that (illustrating) was the front of the building there.

The COURT: Yes.

The WITNESS: And there is a door, a side door out here, I remember he pointed out, being a side door, and right back from the side door was an out-room, where he kept kerosene, gasoline, or kept oils; I think he mentioned some turpentine being in there; it was in the back of the building, what would be considered the back of the building.

Mr. HINDMAN: That is all.

#### CROSS-EXAMINATION.

By MR. CANNON:

Q. What is your business?

A. Fire insurance adjuster.

Q. And when was this testimony taken or these statements made?

A. Some time in March, if I remember correctly.

Q. March, after the fire?

A. After the fire.

Q. You were present, were you?

A. Yes, sir.

Q. Where was Mr. Miller?

A. Mr. Miller was present.

Q. And where was it?

A. It was taken on our office,, 1123 and 1124 Paulsen Building.

Q. Paulsen Building in this city?

A. In Spokane; yes, sir.

Q. What were you there for?

A. I was there for the purpose of helping take this testimony; examining Mr. Miller under oath regarding the fire.

Q. What did you say Mr. Miller said?

A. Relative to what?

Q. Relative to gasoline?

A. He said that there was gasoline in the building, five gallons; five-gallon can of gasoline.

Q. Was that just his language?

A. In substance.

Q. Will you find it for me? I guess I have it here. I want you to give me just exactly his language, you have such a positive recollection of it.

A. I don't think I can give you his exact language.

Q. You testified positively a minute ago.

A. He said that there was gasoline in the building; five gallons of gasoline in the building.

Q. He said there was five gallons of gasoline in the building; what else did he say upon that subject?

A. That the oil was in the oil room, I remember.

Q. He spoke about the oil room?



A. There was more or less said regarding the oil room; the oil room was built for keeping oils in, not only gasoline, but kerosene.

Q. Did he say it was for the purpose of not only keeping gasoline, but kerosene.

A. Keeping oils.

Mr. CANNON: I wish you would find it for me.

The COURT: Can you point out the statement in the deposition?

Mr. HINDMAN: That part of it goes over ten or fifteen pages.

Mr. CANNON: This being a court case, I will not cross-examine him further than that. The Court will appreciate whether the statement is accurate or not after he hears the testimony.

#### REDIRECT EXAMINATION.

By MR. HINDMAN:

Q. Who was present at that examination?

A. Mr. Weinstein was present, Mr. Miller, Mr. Fred Stolz, Mr. Lake, my partner, Mr. Hall and myself and Mr. Hindman.

Witness excused.

R. WEINSTEIN, witness called on behalf of defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. HINDMAN:

Q. You are one of the attorneys for the plaintiff, are you?

A. I am.

Q. You were acting as attorney for Mr. Miller on

the 27th and 28th days of March, 1911, were you not?

A. I was.

Q. And you attended a meeting where his statement was taken?

A. I did.

Q. And you were there for the purpose of representing him?

A. I was.

Q. And you are the Mr. Weinstein referred to in this statement?

A. I expect that I am the one, yes.

CROSS-EXAMINATION.

By MR. CANNON:

Q. Tell us how this testimony was taken, whether by question and answer, or how?

A. Well, Mr. Miller is very hard to understand the English language, and they kept him repeating question after question; they had him so rattled that he didn't know whether he was afoot or horseback.

Mr. HINDMAN: I object to that.

Mr. CANNON: That is all.

REDIRECT EXAMINATION.

By MR. HINDMAN:

Q. You were there to represent him?

A. Yes, sir.

Q. You read the statement over to him before he signed it?

A. Not that same day.

Q. You took a copy of it home with you or to your office?

A. I don't remember as to that; he signed it in Mr. Folger's office.

Q. But you went over it with him before he signed it?

A. I don't remember as to that.

Q. You were there, weren't you, when he signed it?

A. I can't say that I was—I cant' say that I was there.

Q. Don't you remember of you and I going over this matter again?

A. I think Mr. Stolz was with him there at that time.

Q. No; don't you remember I was going over it and telling him to make any corrections that he desired to in the testimony?

MR. CANNON: I object to counsel cross-examining his own witness.

A. Why, to the best of my knowledge and recollection I don't remember that; I thought it was Mr. Stolz.

Q. Didn't you come back with your client the day he signed this?

A. Not the second time; there was one examination I was there, and the second examination I was there, but as to my being there when he signed it, I can't say; I don't know that I was.

#### RE-CROSS-EXAMINATION.

By MR. CANNON:

Q. In other words, they first examined him and then came back and examined him again?

A. Yes, sir.

Q. After they had taken one deposition and he had signed it, they tried it again?



A. Yes, sir.

Witness excused.

Mr. HINDMAN: I want to read from Page 28.

(Reading).

"Q. You built an addition on it?

"A. I built a new addition to it.

"Q. What did the addition cost you?"

Mr. CANNON: Objected to as immaterial.

The COURT: It will be received subject to the objection.

Mr. HINDMAN: (Resuming the reading).

"Q. What did the addition cost you?

"A. It cost, I think, about \$4,500 to build at that place.

"Q. You put in \$4,500 to build the place?

"A. Yes, sir.

"Q. How many stories high was it?

"A. One-half was a two-story building and one-half "a big addition to that—30x60, 30x50—together it was "that. The inside has all been turned over and remodeled.

"Q. And you built about how much?

"A. 50x65.

"Q. What did that cost you?

"A. It cost all together, I think, about \$4,500.

"Q. That one addition?

"A. To remodel inside and the upstairs.

"Q. You say it cost you \$4,500?

"A. About \$5,000, pretty near."

Mr. CANNON: What has that got to do with this case?

Mr. HINDMAN: Proving our part of the case.

Mr. CANNON: You admit the property was worth the amount claimed?

Mr. HINMAN: There are some things as to when the work ceased, when he ceased to work upon the building; it goes to the question that they have employed carpenters for more than fifteen days.

Mr. CANNON: All right, go ahead.

Mr. HINDMAN: (Resuming reading).

"Q. Who worked for you on that house, if you have "not forgotten?

"A. It was quite a few of them, because it has "changed hands; one of them left.

"Q. Mr. King worked for you?

"A. King; yes, sir.

"Q. What did you pay King?

"A. He worked only a short time.

"Q. How much did you pay him?

"A. I don't know; he has got about \$125; I think he "got it; I paid him \$50 once and about \$75 he got over "there while he was working.

"Q. He did what, you say?

"A. I say I gave him \$50 when he quit and about \$75 "during the time when he was working, a couple or three "or four weeks.

"Q. How long did he work?

"A. Three or four weeks.

"Q. Was he there after the time that you opened up "the building to do business?

"A. No, sir.

"Q. When did he leave?

"A. He left about five or six weeks before the building was completed.

"Q. Wasn't he around there at all after that?

"A. No, sir; not at all.

"Q. Did you employ one Davis?

"A. Yes, sir.

"Q. What did you pay him?

"A. He is supposed to be taking the contract; he had about \$450.

"Q. Four hundred fifty dollars?

"A. He hired some men to help, too.

"Q. How long did he work for you?

"A. About three months.

"Q. About three months. When did you commence building this addition?

"A. I think October 18th, if I ain't mistaken.

"Q. October 18th. When did Davis commence working for you?

"A. About October 17th, I think, he started in.

"Q. And he quit when?

"A. He didn't finish at all yet when he quit.

"Q. He was working on it at the time of the fire?

"A. Yes, sir; he was working during the time; it was not completed yet during that time, and it was always have to be fixed up; the doors was not in yet; the partitions was not up yet and shelving; he was still working there.

"Q. You say he took it on contract?

"A. He took it on contract; yes, sir, \$4 a day.

"Q. Four dollars a day?

"A. Yes, sir; but he hired help, what I paid \$2.50 and



"\$3 a day to; there was about eight or ten men working  
"there right along.

"Q. You paid him \$450?

"A. Yes, sir; I paid him that, I say, \$450, himself.

"Q. For himself?

"A. For himself; I mean by himself, but he paid out  
"some help out of his own pocket.

"Q. What is that?

"A. He paid some help a few dollars.

"Q. Out of his pocket?

"A. Yes, sir.

"Q. You paid him \$4 a day, you say, from the time  
"he started in?

"A. Four dollars a day.

"Q. And he started in when?

"A. The 17th of October, I think.

"Q. The 17th of October?

"A. Yes, sir.

"Q. And your house burned when?

"A. January 2nd.

"Q. January 2nd.

"A. Yes, sir.

"Q. Now, you say that King quit working when?

"A. I could not remember now; I think he quit about  
"six or seven weeks before the building was completed."

Mr. HINDMAN: I am reading now from Page 56;  
well, I will commence right at the bottom of Page 55.  
(Reading).

"Q. How long a time after this fire was it that you  
"sent Mr. Davis the money, that you saw him?

"A. After the fire?

"Q. Yes, sir.

"A. He was working for me in the woods.

"Q. How long after?

"A. I paid him the 27th or 28th; I paid him the full "amount that was coming to him, and he worked for me "in the woods; he was pitching wood, cordwood.

"Q. I thought you said he was working on this "building?

"A. He did start out after the fire.

"Q. Let us understand one another. He was work- "ing on this building for you up to the time of the fire?

"A. Yes, sir.

"Q. Now, after the fire you paid him?

"A. I paid him before the fire.

"Q. Then did you pay him all before the fire?

"A. I paid part of it.

"Q. How many days before the fire?

"A. About four days, I think."

Mr. HINDMAN: Reading from Page 33. (Read- ing).

"Q. Did you have any dynamite in the store up there?

"A. No, sir.

"Q. None at all?

"A. No; there was a whole lot of ammunition.

"Q. Did you have any dynamite?

"A. No; I don't think so.

"Q. Didn't have any?

"A. No.

"Q. Did you have any gasoline?

"A. Yes, sir; five gallons of gasoline; five gallons at "a time in the store.

"What else?

"A. About sixty or seventy gallons of oil.

"Q. What kind of oil?

"A. Kerosene.

"Q. Kerosene; where did you keep it?

"A. Kept it in the back.

"Q. What part of the back; right in the back part of  
"the store?

A. Back part of the store it was.

"Q. Did you have any stove there?

"A. No; the stove was right in the middle of the  
"store.

"Q. The middle of the store?

"A. Not quite in the middle, but pretty near in the  
"middle."

Mr. HINDMAN: Page 58. (Resuming reading.)

"Mr. Hindman: That is all.

"Mr. Weinstein: Q. That place where you kept the  
"kerosene, there was a special place built for that, wasn't  
"there, at the end of the building?

"A. At the end of the building; yes sir."

Mr. HINDMAN: Now, then, on the next day he was  
further questioned upon that proposition.

Mr. CANNON: You were the attorney; you examined him; the record ought to show that, too.

Mr. HINDMAN: The record ought to show that,  
too. Bottom of Page 61. (Reading resumed).

"Q. How much coal oil did you carry there?

"A. I carried a barrel of forty-eight gallons.

"Q. What did you carry it for, for sale?

"A. For sale; yes, sir.



"Q. Now, did you keep other explosives there for sale.

"A. I kept some can oil besides.

"Q. Some can oil?

"A. In five gallon cans.

"Q. What kind?

"A. No. 1 coal oil, I suppose.

Q. Did you keep any other explosives there?

"A. I kept turpentine for sale, and one can of gasoline for sale; I sold one gallon to that 'blind pig' outfit.

"Q. 'Blind pig' outfit.

"A. Some oil to that; that was the first time I knew of any.

"Q. I don't understand you well. As I understand you, you say you kept one can of turpentine?

"A. One can of turpentine.

"Q. For sale?

"A. Yes, sir.

"Q. That you sold out to private parties?

"A. To private people.

"Q. That was a five-gallon can?

"A. Yes, sir; five gallon, one can.

"Q. And you kept five gallons of gasoline also for sale,

"A. Yes, sir.

"Q. Where did you keep it?

"A. Kept it right in the end of the hallway.

"Q. In the store?

"A. No; the hallway from this store; it is on to the store, certainly; it is all in one building.

"Q. All in one building, connected with the store?

"A. Yes, sir.

"Q. How do you account for the fire?

"A. How do I account for the fire?"

Mr. HINDMAN: Now beginning at the bottom of Page 63. (Reading resumed).

"Q. Was there any other oils there that you kept or "explosives that you kept?

"A. Not around there; no sir; the oil was in a side—"like this right over here—and the oil was in this side in "the corner.

"Q. In that side of the house, in the corner?

"A. In the corner, but there was a door between it.

"Mr. Weinstein: That is the same question I asked "you yesterday.

"The Witness: Yes, sir; it is the same; there was only "the furniture laying in there.

"Q. What I am trying to get at, this gasoline you "had there then was not near the fire?

"A. No, sir; I will show you on a piece of paper if "you want to. (Illustrating by drawing on paper). "Now this was the building; that was the building all "the way around. Now, from this side that was the cen- "tral door; all back of this building was one hallway like "this—you see, this was a hallway from here up in the "back, another door; that was this way; you go out this "way and that was the oil stand.

"Mr. Weinstein: Store room practically built?

"A. Store room for that on the same store, only par- "titioned, but this is a door going out in the store from "this, going right into the store. Now, from here to "here that was the stove. This is the toilet, and now they "turn back this way—

“Q. Where was the toilet; back here?”

The Court: The same as he pointed out this morning.

Mr. HINDMAN: Yes, sir.

(Resuming reading).

“Q. Now, you say there was a door between this and  
“this partition?

“A. Up to the store; this was a big store; that is, the  
“main part of the store.

“Q. The door to this place where you kept your oil?

“A. Yes, sir.

“Mr. Weinstein: A door into this room and a door  
“into this room, which was a partition separate, to keep  
“the oil separate, then another door that led up to the  
“stairway going upstairs?

“The Witness: And this was a door over here where  
“it goes down from downstairs outside, out in the hall-  
“way, and goes right this way and turns around up-  
“stairs.

“Q. This here, then, was a partition built onto the  
“main store?

“A. Yes; that was.

“Mr. Weinstein: Two entrances to the rear entrance  
“going upstairs; one here and one here, which led  
“through this store room, the oil store room?

“Mr. Hindman: The oil store room?

“Mr. Weinstein: Yes, sir.

“The Witness: The oil stopped right here; this was  
“furniture.

“Mr. Weinstein: The witness drew this plan for me  
“so many time that I can tell you. When he built this  
“addition to this store, the idea was to keep oil, and in



“order to do that he knew that he would have to keep it away from the store proper, so therefore he built a partition away from the store, which would lead to the rear entrance going upstairs, and also have an entrance into the store.

“The Witness: This was all the building over here. “There was a partition before, and I left that partition over there. I left that partition right in there for keeping the oil separate from this building, from the main part.

“Q. What kind of a roof did you have on that?

“A. A shingle roof.”

Mr. CANNON: Before you leave those depositions, I don't care to introduce any part of them, provided you will agree that this is the fact, that the place where that fire started was in the center of the building, and there is no evidence that the fire started where you say the oil was.

Mr. HINDMAN: I will admit that. Have you your reply here?

Mr. CANNON: Yes, it is on file; that is a part of the record.

Mr. HINDMAN I want to introduce the reply, your Honor.

Mr. CANNON: The reply may be considered as binding upon us.

Mr. HINDMAN: I may want it as evidence.

Mr. CANNON: What particular feature of it, to the effect that work was going on?

Mr. HINDMAN: No, to the feature that after giving this testimony, he made a false reply, and that by virtue

of the terms of the policy, which provides that any fraud or false swearing committed at any time after the policy is issued, the policy is vitiated, that the policy became vitiated.

The COURT: The reply will be considered in evidence.

Mr. HINDMAN: I will read the portion of it I desire into the record now: (Reading).

“Replying to the first separate defense, plaintiff ex: “pressly denies each and every allegation, averment, “matter and thing in said first affirmative defense “contained, whether as therein stated or otherwise.

“Replying to the defendant’s second separate defense, plaintiff denies each and every allegation, averment, matter and thing in said second defense stated, “whether as therein alleged or otherwise except that “plaintiff states that a small amount of work was done “on and about said building between the dates stated; “that the agents of the defendant knew of the alterations, changes, construction and repairs being made “on or about said building and consented thereto, and “the policy of insurance sued upon in this action was “written while the work, alteration, changes and repairs aforesaid were being done.”

W. L. CALHOUN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. HINDMAN:

Q. Mr. Calhoun, you reside at Camden?

A. Yes, sir.

Q. As I understand, you originally owned this building that was fired?

A. Yes, sir! I owned it at one time; that is, the main part of it.

Q. That is, the old building

A. The old building.

Q. Your store is directly across the street from Mr. Miller's?

A. Not directly across; it is on the opposite side of the street, catecornered, somewhere about 200 feet or a little less.

Q. Were you there during the time this addition to this building was being erected?

A. I passed there frequently; stopped once in a while and looked on a little while.

Q. You could see the building right across from where you were?

A. Yes, sir.

Q. And you saw them working?

A. Yes, sir; in plain view.

Q. During the time that they were working there, where did they keep the lumber?

Mr. CANNON: Objected to as not within the issues.

The COURT: Is this within the issues?

Mr. HINDMAN: Directly, to the question of increased risk.

The COURT: Yes.

Mr. HINDMAN: Q. Where did they keep the lumber.

A. I saw a good deal of it lying in the street.

Q. Did they have any in the building?



Mr. CANNON: Objected to as not within the issues.

Mr. HINDMAN: Yes, we plead it directly.

Mr. CANNON: The only fact is the keeping of workmen there and the keeping of workmen employed.

The COURT: Objection overruled.

A. Yes, there was a good deal of it in the street; some of it was scattered out, though; they carried in a good deal of it.

Q. Were there any shavings around the building?

A. I saw shavings in the building frequently, yes, sir.

Q. Where were the goods during the period of time these men were working?

A. They had the goods piled up in every direction inside.

Q. Did you see them take out what would be the partition, the south end of the building, the side partition there?

A. Why, yes I see them; I see it before they took it out and after; I see it while they were working on it too.

Q. When was that taken out, with reference to the time the building was completed?

A. I could not say as to time; it was during the time they were building.

Q. Did you see workmen smoking in there,

Mr. CANNON: Objected to as not within the issues.

The COURT: Yes, I think it is within the issues.

A. Yes, sir.

Mr. HINDMAN: Q. Now one question, Mr. Calhoun. How was the front part of the building changed, just show the Court, if you please?

A. Now this is the old part of the building here.

Mr. CANNON: Better mark it "20x50."

A. (Continued) The main building, of this old one, was 20x40, and then there was a shed on behind.

Mr. HINDMAN: Q. This is the back part here?

A. Or back room; yes, sir; I think this was 16 or 18 long, I don't know which.

Q. Was there a door here in front of the old building?

A. Yes, sir; door in the center, and windows on each side; and then when he divided this partition and built this addition on, he closed up this window, one window, I think.

Q. And put in a door?

A. And put the door in the center and a big window on each side; made it all one room.

Q. Now did he build a porch in front?

A. Yes, sir; built a porch in front.

Q. Now what did he do with reference to changing the stairway?

A. Well, the stairway originally was outside, and he had a back door here (illustrating), and he had a door out of this into the hall and it went down the hall and up the stairs and made a kind of a jog here I think; before, he got into the stairway and went up; there was a jog there, but I don't remember just how that jog was; I never took any great pains to notice it close; then he had a hall through upstairs and in the old building, and I think four or five rooms on each side.

Q. Did he build that afterwards?

A. Yes, sir.

Q. The building before was one room for a dance hall?

A. Yes, sir; for a dance hall.

Q. What proportion of the work was put on this portion of the building compared to what was put on that part?

A. Pretty cheap.

Q. No, I say what proportion of the time and labor?

A. I could not tell you about that. I just passed occasionally and saw the improvement going on.

Q. You say you saw the improvement going on?

A. Yes, sir.

Q. From time to time, and it began, didn't it, some time early in October?

A. Well I don't remember the date that he commenced to work.

Q. But any way, he commenced to put several men to work there and they continued their work until it was substantially completed?

A. Yes, he had—Mr. Davis was foreman on the work; also he had several men working on it occasionally.

Q. And the lumber as it was taken from the railroad company was piled outside around, and then when they wanted to use any lumber they would take it in?

A. Yes, sir.

Q. In the meantime, I suppose, in putting up shelving and one thing or another, there was occasion to have shavings somewhat?

A. Yes, they built the counters inside; trimmed up the shelving.



Q. And when the goods were brought in, I presume they were put on the shelves when the shelves were ready for them; is that true?

A. Yes, sir.

CROSS-EXAMINATION.

By Mr. CANNON.

Q. But you did not pay very much attention to it, did you?

A. Oh, I see what was going on, passing frequently; I would go inside frequently and look around and see what was going on; I did not go very often.

Q. And you did not fix the dates in your mind as to when you went?

A. No, it was during the time they were building and putting in the goods.

Q. You don't know, of course, when these policies were issued or anything like that?

A. No, I don't.

Q. So you don't know whether that work was done before the policies were issued or afterwards?

A. There was one gentleman called me up wanting to know how much of a store I had and I told him, "I don't know; you had better come up and see."

Q. Did he come up to see?

A. No, he did not, as I know of.

Q. Do you remember a gentleman there in December examined your stock of goods too?

Mr. HINDMAN: Objected to as not proper cross-examination.

Mr. CANNON: Q. Did not a gentleman examine your stock of goods in December?

A. No, sir.

The COURT: For the purpose of fixing the date or something, I will permit it.

A. (Continued) Not particularly that I know of.

Mr. CANNON: Q. About when did the gentleman telephone out?

A. Well, it was, I could not give you the date it was.

Q. Was it before?

A. It was after or about the time of his moving in or after he moved in.

Q. Now your best recollection, though is, it was about the time that the bulk of the goods were coming there?

A. I think we got a good many of them next day, yes, sir.

Q. And the gentleman called you up from Spokane?

A. Yes, sir

Q. And asked you how you were getting along out there and what sort of a stock you had?

Mr. HINDMAN: Objected to as not cross-examination; I did not bring that out. It is immaterial.

The COURT: I think it is immaterial.

REDIRECT EXAMINATION.

By Mr. HINDMAN:

Q. Were carpenters working on this building at the time of the fire, do you know?

A. They had been up to that time, I think, some of them.

Q. Up to the time of the fire?

A. Yes, sir.

Witness excused.

Mr. HINDMAN: We now offer under the decision in the Kentucky-Vermillion case, to permit the plaintiff here to recover for the amount of the premiums paid. That is simply an offer; interest from January 17, 1911.

Mr. CANNON: We are not quite satisfied with it; we think the offer comes too late. I think after conference we will decline the offer.

Thereupon the defendant rested.

Thereupon the plaintiff introduced evidence to sustain the issue in rebuttal on his behalf as follows:

Mr. CANNON: I want to read the deposition of John Davis, the deposition that has been published here. Do we need to read the preambles?

Mr. HINDMAN: Only to the extent of the agreement there, that is all.

Mr. CANNON: (Reading).

"It is stipulated and agreed by counsel, without waiving any of the objections made, that one deposition may be taken by the Notary Public written as four depositions, the witness to sign each of the four. This for the purpose of saving the time of taking the four depositions, provided the matters, if pertinent, are equally pertinent to each one."

Mr. CANNON: There are four cases; two of them are in this court. (Reading).

"Q. What is your full name?

"A. John Davis.

"Q. And where do you live at this time?

"A. My home is in Seattle; there is where I have been making my home.



"Q. Are you intending to leave the jurisdiction of  
"this Court?

"A. Yes.

"Q. Where are you expecting to go?

"A. I expect to—oh, I don't know.

"Q. Is it your purpose to leave the State of Washing-  
"ton?

"A. Well, possibly it is; yes.

"Q. And when do you intend to leave?

"A. I can't tell you at all; I don't know myself; ac-  
"cording to how things turn up for myself. If I might  
"get work I might go, you see."

Mr. HINDMAN: Can't we waive all of that? We  
don't care about it.

Mr. CANNON: Yes. I finally got him to tell us  
where he was going. (Reading).

"Q. Were you employed by Jacob Miller, the plain-  
"tiff in this action, in December of last year?

"A. Yes, sir.

"Q. And January of the present year?

"A. Yes, sir.

"Q. Where?

"A. Camden, Washington.

"Q. What is your business?

"A. Carpenter.

"Q. During your employment with the plaintiff at  
"Camden, Washington, did you ever carry a five-gallon  
"can of turpentine and a five-gallon can of gasoline?

"A. I took it out from the depot.

"Q. Where did you put it?

"A. Put it in the store room.

"Q. Where was the store room?

"A. Well, there was the main building and a lot in  
"between and the store room next.

"Q. Do you know the building that was burned in  
"Camden?

"A. Yes.

"Q. January 2nd, of this year?

"A. Yes.

"Q. How far from that building was the can of tur-  
"pentine and gasoline stored?

"A. I can't tell you exactly the distance; one full lot  
"in between; I don't know the size of the lot.

"Q. A lot is about how wide?

"A. I can't tell you; probably one hundred feet; I  
"don't know exactly.

"Q. Prior to the fire did you use any of the turpen-  
"tine?

"A. Well, I didn't; no. I put it in there to mix paint.  
"I didn't mix up no paint.

"Q. Was any of the gasoline disposed of prior to the  
"fire?

"A. I sold one—I don't know whether it was a gallon  
"can, but I know I sold some to the blind pig man.

"Q. And after the fire what did you do with the gaso-  
"line?

"A. I took it up on the ranch with the turpentine;  
"got orders from Miller to take everything away from  
"the store room, as the store was broken into; afraid  
"somebody would steal it. In fact, he was going to use  
"the turpentine to mix paint up on the ranch. I took  
"everything what was there.

"Q. Can you say whether the turpentine and gasoline

“remained in that store building until after the fire?”

“A. Certainly; we didn’t move it because our store “was practically filled up with everything and we couldn’t “get it in there, anyhow; we had no occasion to bring it “in there. We wanted to get everything out of the way “because he had the place filled up with stuff as it was.”

Mr. CANNON: Do you care for the cross-examination?

Mr. HINDMAN: No.

MRS. BERTHA MILLER, a witness called in rebuttal on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. CANNON:

Q. What is your full name?

A. Bertha Miller.

Q. And you are the wife of Jacob Miller, the plaintiff in this action?

A. Yes, sir.

Q. Were you living with him in Camden at the time of this fire, or near Camden?

A. Yes, I was living there.

Q. You were living at the ranch, I believe?

A. Yes, sir; on the farm.

Q. Do you remember the day of the fire; I mean what date it was?

A. The fire was the 2nd of January.

Q. Do you remember coming down to Camden with your husband and one Davis a couple of days after the fire?

A. Yes; it was two or three days after the fire we



came down in a buggy and Davis brought us up to the station; we went to Spokane and Davis went to the store and took that stuff there.

Q. What stuff did he take back?

A. He took back what was left there in the storage house, gasoline and turpentine; he took it up to the farm.

Q. Do you remember the size of the cans of gasoline and turpentine, as to whether they were one or two?

A. They were five-gallon cans.

Q. Did you ever have occasion to see those since, to know whether it was gasoline or not?

A. Yes, sir; we used it.

Q. About how much of the gasoline was in the five-gallon can when it was taken up there?

A. Well, it was pretty near full.

Q. Pretty near full?

A. Yes, sir.

Q. And there was turpentine in the turpentine can there?

A. Yes, sir.

Q. Did you see Mr. Davis put them in the buggy, or not?

A. Yes, sir; Davis took them back in the buggy; he was up to the stable and we saw him taking it out.

Q. Where are the cans now?

A. The cans are in the tool house on the farm.

#### CROSS-EXAMINATION.

By MR. HINDMAN:

Q. You say you came down with them and came on to Spokane?

A. Yes, sir; we went to Spokane two days after the fire.

Q. You came down with Mr. Davis and your husband; and that was the time that you came down with Mr. Davis and your husband?

A. Yes, sir.

Q. And you came on down to Spokane?

A. Yes, sir; I came at the same time.

Q. At the same time?

A. Yes, sir.

Q. You did not go back up to the place with Mr. Davis?

A. No; Mr. Davis went alone.

Q. Did your husband come down to Spokane with you?

A. Yes, sir; he came down to Spokane.

Q. How long after you got to Camden that morning was it before the train came?

A. It was about ten minutes before the train came.

Witness excused.

JACOB MILLER, the plaintiff, was recalled in rebuttal and testified as follows:

DIRECT EXAMINATION.

By MR. CANNON:

Q. You have been in the court room during the trial by the defendant of its case here today, have you; you have heard all of the testimony that has gone in?

A. Yes, sir; I did. --

Q. Do you remember of testifying in somebody's office in the Paulsen Building, and Mr. Hindman asked you questions, and Mr. Weinstein was there, some time after

the fire; do you remember that occasion?

A. I do, I think.

Q. Did you hear the testimony that went in here to the effect that there was five gallons of gasoline in the building at the time of the fire; did you hear that testimony read here?

A. I heard it read.

Q. What is the fact relative to that, as to whether you so testified?

A. Well, really, I was sick at that time; Mr. Hindman and Mr. Folger, and they were talking all together and simply pushed me through so quick I didn't know what I was doing.

Q. As a matter of fact, did you know at that time whether——

A. (Interrupting). I didn't know it, but I find it out later on, that it was in the store room.

Q. At the time of the fire you didn't know it?

A. I didn't know it; I knew there was a whole lot of oil cans, but I didn't know if they were gasoline or kerosene.

Q. How much gasoline did you ever buy to take to Camden?

A. Two five-gallon cans; one five-gallon can of gasoline and one five-gallon of turpentine and three cases of kerosene and forty-eight gallons, or one barrel of forty-eight gallons and three cases of two, ten gallons in each case, five gallon cans.

Q. After the fire do you remember coming down to Camden, about the 4th of January, two days after the fire?

A. Yes, sir; I do.



Q. Do you remember your man Davis bringing anything out of the store room?

A. I do remember he took two cans away, but I was not feeling very well during that time; I didn't take no attention to it very much, but I saw him taking it all right from the store room. You see, also, the store room was fifty feet away from the building.

Q. The store room fifty feet away from the building?

A. Yes, sir; on a lot over there; it is an empty lot; it is my building, too, and I had that store room there, and I started building there an addition to it; I see him take it out of the store room, two cans.

Q. Now, this summer—you know what he took up to the house there, don't you?

A. Yes, sir.

Q. Did you this summer use any of the gasoline?

A. I used a little gasoline.

Q. Where did you get it?

A. I got it out of the tool house, and two cans are over there yet.

Q. In other words, you say that was in the can that he took from the tool house up to the farm after the fire?

A. Yes, sir; they are there yet.

Q. Is the building included in the building covered by these insurance policies?

A. Yes, sir; not by these insurance policies.

Q. But there was insurance on it?

A. But there was insurance of \$500 on that building.

Q. But that is not one of the policies here?

A. No, sir; not one of them.

Q. Now, the testimony here that you gave is that

there was five gallons of gasoline and five gallons of turpentine. Did you buy five gallons of gasoline and five gallons of turpentine before the fire?

A. I had it shipped from here in an oil carton.

Q. When it reached Camden did you put it away?

A. No, sir; I did not. Davis used to receive the goods from the depot.

Q. Davis received the goods from the depot?

A. Yes, sir; he used to carry it over there right across from the store.

Q. And after the fire you told Davis to take the stuff from that store house and take it out to the farm

Mr. HINDMAN: I object to that as irrelevant, incompetent and immaterial.

Mr. CANNON: I think that was in before.

Q. What did you tell Davis to do with the stuff in the store house?

A. Before I left for Spokane I told him to take it out, everything; he had to break in the door, and he said, "I might as well take it up to the ranch."

Mr. HINDMAN: I object to what he told you.

#### CROSS-EXAMINATION.

By MR. HINDMAN:

Q. Where did you keep the coal oil?

A. The coal oil, it was in the store in the back room.

Q. The coal oil was in the back room of the store?

A. Yes, sir.

Q. That was a room for the purpose that you built the oil room, to keep that in there?

A. Keeping it for kerosene.

Q. You kept the kerosene there, and you had that in

what we term an oil room, did you, that oil room there?

A. (Referring to diagram). This is the oil room right there?

Q. Where did you keep the turpentine?

A. I don't know nothing about that turpentine; it was oil cans and——

Mr. CANNON: One question that I ought to have asked that I did not.

DIRECT EXAMINATION RESUMED.

By MR. CANNON:

Q. That is you say, the five gallons of turpentine and five-gallon can of gasoline, they shipped it in a sort of wooden box, room for two cans?

A. That is what they did; that was in one box, the company shipped it in.

Q. In one side is gasoline and the other side the benzine?

A. Yes, sir; the same box.

Q. Have that box out to the farm; the box taken up to the farm?

A. Yes; he took the box of tools to mix paint.

CROSS-EXAMINATION RESUMED.

By Mr. HINDMAN:

Q. As I understand, you had a lot of coal oil, did you; you had some coal oil?

A. I had some coal oil.

Q. And you kept that coal oil in what was termed the box room?

A. What was the oil room.

Q. You kept that for sale?

A. I suppose so.

Q. You had gasoline also for sale?

A. Yes, sir.



Q. And you had turpentine for sale?

A. Turpentine was for sale.

Q. And that was for the purpose of selling to the people that came in there?

A. Yes, sir.

Q. Now why didn't you keep your oil outside, if you had your turpentine and your oils in this?

A. This man took it up and put it here when we had it in the other store, because he needed that for mixing paints.

Q. Now you testified before that you sold some of this gasoline to the "Blind Pig" outfit?

A. I did not sold nothing.

Q. On this statement you said, "I sold some of that"?

A. I did not sell it; Davis was the man that sold it

Q. But you stated that you did?

A. No, sir; you must have mistaken me or I am mistaken, one of the two.

Q. What did you sell the "Blind Pig" outfit?

A. I did not sell nothing to them.

Q. You did not sell nothing to them?

A. No, sir.

Q. That room, oil room, that you had back there, was built especially to keep oils in, wasn't it?

A. Specially for certain oils, and when people took it out of there, I didn't know it.

Q. It was done for the purpose of keeping oils in it?

A. All kinds of oil; I couldn't tell you what kind of oils has been put up, and this man Davis worked for me, and he just took a lot of oil; whatever he has saw fit to.

Q. It was built for the express purpose of keeping oils in, wasn't it?

A. That was for kerosene, I suppose.

Q. It was built for the purpose of oils, too?

A. It was for everything.

Q. And was built also for oils?

A. It was for oil, but there was no oil in there.

Q. Did Davis sell some gasoline?

A. I think so.

Q. Did you see him sell it?

A. No, I think not.

Q. How do you know he sold it?

A. Because I seen it in the book, the receipt book.

Q. You saw the receipt in the receipt book?

A. No, sir; that gasoline, I saw it in the receipt book.

Q. Do you know where he got it?

A. I don't know where he got it; I knew he had gasoline and oils of all kinds; I suppose he knew where he got it.

Q. As I understand, you kept all of the merchandise that you had in this store room.

A. Yes, sir.

Q. And you had your oils in the store room?

A. Yes, sir, there was out there in the back.

Q. And that you kept the merchandise in the building that was burned?

A. Yes, sir.

Q. And you kept it all in there?

A. Coal oil in the back.

Q. No, I say you kept all of the merchandise in this general building?

A. But it was separated; that room was separate away from the merchandise.

Q. Yes, I understand that, but see if we can't understand one another.

Mr. CANNON: We understand it.

Mr. HINDMAN: Q. When you shipped your merchandise up there, you put it in the building that was destroyed by fire, did you not?

A. Did I put that?

Q. Yes, sir.

A. Excuse me.

Q. You put the merchandise and groceries, and all of that that was destroyed by fire, in the building?

A. Yes, sir.

Q. You put all of it in the building that was destroyed by fire?

A. All of it?

Q. Every bit of it?

A. Every bit of it.

Q. The only thing that you do say you did have in this building was simply this gasoline?

A. I don't know nothing about that gasoline until I find it later on at my place.

Q. That is the only thing that you say you did have in this building, was that gasoline?

A. There was something else; there was some furniture, some tables over there in the other building, and I think they are there yet, the kitchen table, cabinet table.

Q. You were in this store, you or your clerks, all of the time, were you not, in the store building proper?



A. Not all of the time; I had two stores here in Spokane.

Q. I mean practically all of the time?

A. I was busy all of the time; whatever was done was done through my clerks; I could not get out any more.

Mr. HINDMAN: Have you got those proofs of loss. I want them.

Mr. CANNON: I haven't got them; I haven't seen them.

Mr. HINDMAN: Q. Who made that proof of loss for you?

A. Who made it?

Q. Yes.

A. When I sent that goods up to my store.

Q. Who made the proof of loss for you?

A. Listen to me a moment and I will tell you all about it.

The COURT: Q. Can't you name the party who made it?

A. I told you I took the goods home—for my wife.

The COURT (interrupting): Who prepared the proof of loss?

A. Who prepared it?

The COURT: Yes.

A. The bookkeeper.

Mr. CANNON: Q. The proof of loss, after the fire, who sent in the proof of loss; that is what he means; who prepared it?

A. The Spokane Merchants' Association.

Mr. HINDMAN: Q. And you swore to that?

A. Yes, sir; I did.

Q. Was anything destroyed that was in this oil house that you are talking about now, that that oil was in?

A. Anything destroyed in the out house?

Q. Yes.

A. No; there was nothing in it.

Q. That building was not destroyed?

A. No, sir.

Q. Nothing was destroyed in there?

A. A few articles.

Q. In your proof of loss you make a claim, do you not, for this very oil that was destroyed?

Mr. CANNON: Objected to as not the best evidence.

The COURT: Objection sustained.

Mr. HINDMAN: We call for the proof of loss.

Mr. CANNON: I can not give them to you; I have never seen them.

The COURT: Were they returned?

Mr. HINDMAN: They were returned to the assured.

Mr. CANNON: I don't know anything about it; I have never seen it; it may be the Merchants' Association has got that too.

Mr. HINDMAN: If the Merchants' Association have that, we want it. My point is that he put in a claim against this company for this five gallons of oil; that he claimed it was destroyed in this building, gasoline, kerosene and coal oil.

Mr. CANNON: If you find that, you may file it

here before this case is decided and it may be received as evidence.

Mr. HINDMAN: All right.

Witness excused.

Mr. CANNON: That is all our rebuttal.

One question before we close. I want to insist upon amending, in accordance with the proof, to the effect that after this fire, some two weeks after the fire, the insurance premiums that had not been paid—a part of them had been—were paid and accepted by the Insurance Company.

The COURT: I don't know what the system of transacting business is among these insurance agents.

Mr. CANNON: I think they have sixty and thirty days to pay the premium; the premium must be paid within sixty days to the state agent.

The COURT: I shall permit the amendment.

Mr. HINDMAN: I move for judgment in favor of the defendant.

The COURT: Overruled for the present.

Mr. HINDMAN: To which ruling defendant excepted.

Thereupon the Court continued said cause to hear argument to some date hereafter to be fixed by the Court.

This matter came on for argument on the-----day of December, 1911, on the date set by the Court to hear the same, and the defendant upon said argument requested the Court to enter a judgment in its favor for the reason that the evidence introduced showed that plaintiff had violated the conditions of his



policy by keeping gasoline on the premises, which motion was overruled and defendant excepted, and defendant then and there further moved the Court to enter judgment for it for the further reason that plaintiff employed mechanics in the building altering and repairing said premises for a period of more than fifteen days, contrary to the provisions of said policy, which motion was overruled and defendant excepted.

That after the opinion of the Court was written and filed and before judgment was entered, defendant moved for judgment in its favor notwithstanding the said opinion, which motion was denied and defendant excepted. Exception allowed.

Plaintiff's Exhibit "2."

DAILY REPORT. Agency at Cheney, Wash.  
THE SPRING GARDEN INSURANCE COMPANY  
PHILADELPHIA.

Policy No. 7349 Renewal of No. New  
Burgard & Strout, General Agents  
Seattle, Wash.

INSTRUCTIONS.—Report every Policy on the day it is made. Give a full copy of the Policy in every case. Report but one Policy on this sheet. All Endorsements to be reported on blanks furnished expressly for that purpose.

---

NAME OF ASSURED

Jacob Miller

---

Commencement of Risk	Term	Expiration of Risk	New Rate	Rate Last Year	Amount Insured	Amount Premium
Nov. 17, 1910	1 yr.	Nov. 17, 1911	2.75		\$5,000.00	\$137 50

---

COPY OF POLICY  
JACOB MILLER

\$5000.00 On stock of goods, wares and merchandise of every kind and description, consisting principally of groceries, hardware, crockery, provisions and produce, novelties, cutlery and such other merchandise as is generally found in a general merchandise store, their own or held by them in trust or on commission, or sold but not delivered; all while contained in the one and two story frame, shingle roof building and/or additions adjoining and/or communicating, or in cellars or basement thereto, situate on the southwest corner of the SW  $\frac{1}{4}$  of Sec. 34, Twp. 30, North, Range 44 E. W. M., Camden, Washington, being about 30 miles east of Spokane, Wash.

Permission granted to effect other insurance; to make ordinary alterations and repairs; to burn kerosene of Standard quality for light, lamps to be filled during daytime only; to keep not to exceed 50 lbs. of powder and 200 gallons of refined kerosene, it being warranted by the assured that the oil shall be drawn by daylight, or at a distance of not less than 10 feet from artificial light.

LIGHTNING CLAUSE.

This slip is attached to and hereby made a part of

policy No. 7349 of the Spring Garden Insurance Company of Philadelphia.

Dated: 17th day of Nov., 1910.

CHESTER H. HARVEY,  
Agent.

This Risk is on Map, Vol.-----Block-----

Not mapped

Page-----Street No.-----

(If not shown on Map make diagram on other side.)

Mailed-----191

Is this risk under fire department protection? No.

CHESTER H. HARVEY,  
Agent.

SPECIAL NOTE.—By filling all the blanks on both sides of this report, much correspondence may be avoided, and the pleasure of doing business with you greatly promoted.

CHATTEL MORTGAGES—Decline Risks on Personal or Movable Property, if Mortgaged.

ANSWER ALL THESE QUERIES.

Have you personally inspected this risk? Yes. When?

Are you personally acquainted with assured? No.

How long has he resided in this place? In Spokane 10 yrs.

How far is the risk located from your Agency? 30 miles east.

How old is the building? New 3 months.

Is it in good repair? Yes.

Chimneys—are they of brick? Yes.

How is it heated? Stoves. How lighted? Lamps.

What power, if any, is used? None.



What is the cash value of property insured? \$15,000.00.

Is it encumbered in any way? No.

Is it occupied by owner or tenant? Owner.

Has assured ever had a fire? No.

(If so, give full particulars.)

Do you fully recommend this risk? Yes.

What is the amount of additional insurance? \$3000.00.

Are all policies concurrent? Yes.

Give names of companies and amounts:

Seaboard Fire & Marine, \$3000.00.

This covers his stock at present, as he is just moving in;  
we will keep adding to this from time to time.

#### OTHER INSURANCE BY THIS COMPANY

In or On Same Building

No.----- \$-----

No.----- \$-----

No.----- \$-----

No.----- \$-----

Within 100 Feet

No.----- \$-----

No.----- \$-----

No.----- \$-----

No.----- \$-----

#### GIVE ENTIRE OCCUPANCY OF THE BUILDING

Where Policy covers mercantile building give names of  
tenants

Basement -----

First Story, General Merchandise.

Second Story, Dwelling of assured.

Third Story -----

Fourth Story -----

Fifth Story -----

## EXPOSURES WITHIN 100 FTET

North -----

South -----

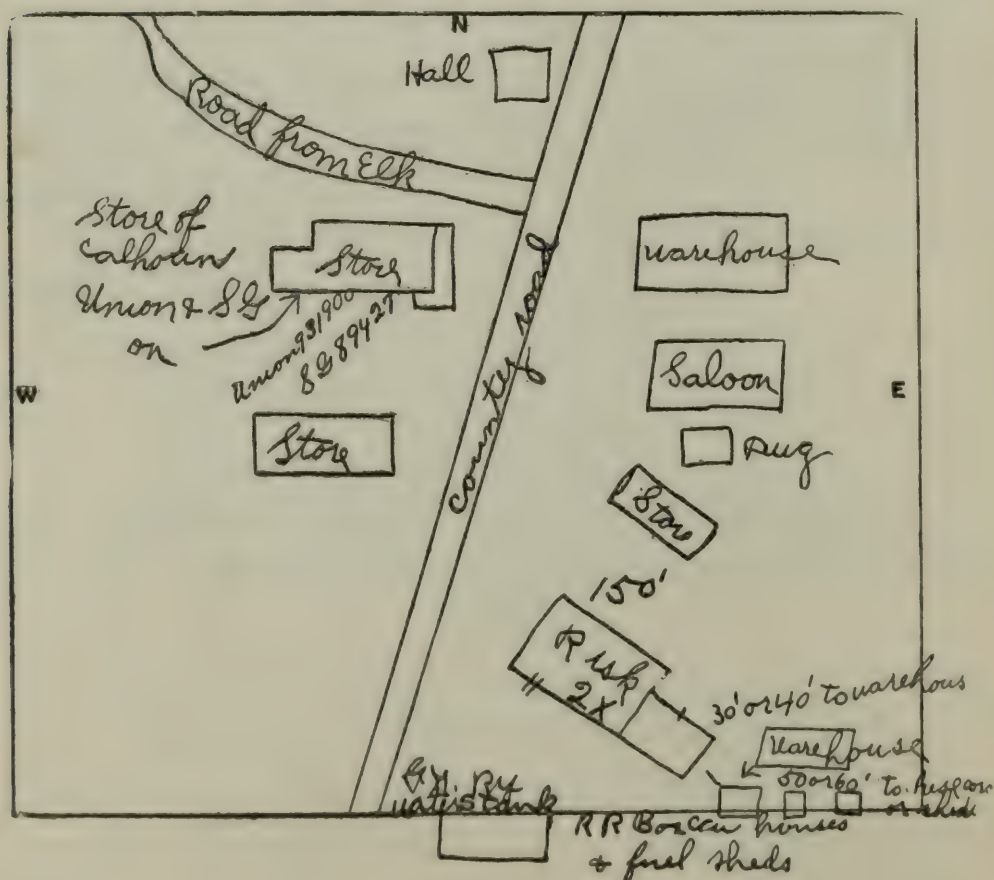
East -----

West -----

INSTRUCTIONS TO BE OBSERVED IN MAKING  
THE DIAGRAM

Use Red Ink for Brick or Stone, and Black for Frames. Mark distance between buildings, and give All exposures within 100 feet. Make Fire Walls with a Heavy Red Line. Indicate Shingle roof by a cross (X), Composition by a (.), and Slate or Metal by a star (\*).

CHATTEL MORTGAGES—Decline Risk on Personal or Movable Property, if Mortgaged.



SPECIAL NOTE—By filling all the blanks on this report, much correspondence may be avoided, and the pleasure of doing business with you greatly promoted.

Plaintiff's Exhibit "3."

No. 28069

Spokane, Wash., Jan. 16, 1911.

SPOKANE MERCHANTS'

ASSOCIATION

Pay to the order of Rogers &  
Rogers \$210.95 Two hundred  
ten and 95-100 Dollars.

Spokane Merchants' Association

J. B. Campbell,

Secretary.

L. Macomber

To THE OLD NATIONAL  
BANK, Spokane, Wash.

*Voucher Check*

indorsement of this  
check constitutes re-  
ceipts for items or  
services stated  
hereon.

re J. Miller

c/o Insurance

(PAID)

And now, in furtherance of justice, and that right may be done, the defendant, the Spring Garden Insurance Company, tenders and presents the foregoing as its Bill of Exceptions in this case to the action of the Court, and prays the same may be settled and allowed,



and signed and sealed by the Court, and made a part of the record, and as said Bill of Exceptions contains all the proceedings and evidence had and introduced in this case, and the same is a true Bill of Exceptions, the same is accordingly done this 16th day of April, A. D. 1912.

(Signed) FRANK H. RUDKIN,

*Presiding Judge.*

Spokane, Wash., April 5th, 1912.

Due and legal service of the copy of the above and foregoing bill of exceptions is hereby accepted this 5th day of April, A. D. 1912, in the City and County of Spokane, State of Washington.

(Signed) E. J. CANNON,

(Signed) SAMUEL EDELSTEIN and  
ROBERT WEINSTEIN,

*Attorneys for Plaintiffs.*

Endorsements: Bill of Exceptions.

Filed April 16, 1912.

W. H. HARE,

*Clerk.*

*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.)*

No. 1563.

ASSIGNMENT OF ERRORS.

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

The defendant in this action in connection with the petition for writ of error, makes the following assignment of errors, which it avers occurred on the trial of this cause, to-wit:

1. The Court erred in overruling defendant's objections on the ground that it was incompetent, irrelevant and immaterial, and on the further ground that paroled testimony cannot be received to contradict the terms of a written contract; and on the further ground that there is no endorsement on the policies permitting or allowing the improvements to the following question asked plaintiff Miller:

"I want to know if you had any conversation with any Insurance Agent prior to the 18th day of November, and if so, with whom."

Which was answered as follows, to-wit:

"My first conversation was with a man by the name of Pool. He was an Insurance Man, an Agent. I proposed to him that I was going to build a store, that store

at Camden, so that he was coming in early in October. He came in and he wants to get that Insurance for Rogers & Rogers. I told him I was not ready to give any insurance at all; I build my building first up; so he takes a pencil and he tells me how the building will be; \* \* \* I told him I am going to build a general merchandise store up there. \* \* \* I tell him I will not give any insurance until I build up my place first. \* \* \* He takes a pencil and I showed him how I was going to build up that place.

Q. And you showed him what you were going to build up there?

A. I showed him what I was going to build; all exactly what I showed him."

2. And the Court erred in making the following ruling on the objection to said testimony for the reasons specified in assignment of errors No. 1, to-wit:

"The Court: Under the decisions of the Supreme Court of this State, the Insurance Companies through its Agents having notice that the building was under construction at the time the policy was issued, I think it is doubtful if you can take advantage of this provision, and I doubt if you can avoid it unless the policy really so provides."

3. The Court erred in denying defendant's motion to strike the testimony of plaintiff Miller as to his conversation with Rogers & Rogers, or their agents, prior to the issuance of the policy, for the reason that it was shown by his testimony that Rogers & Rogers, or their agents, were Miller's agents, and not the agent of this defendant, and for the further reason specified in As-



signment of Errors No. 1.

4. The Court erred in overruling defendant's objections to the following questions and answers given by one Pool, a witness on behalf of plaintiff, to-wit:

“Q. Later on and prior to the issuance of the policy did you have any conversation with him relative to remodeling the two story building?

A. Yes, sir; that is an addition to the old building.

Q. State whether or not he drew you a plan of it?

A. Yes, sir.

Q. Or a rough sketch, I mean

A. Yes, sir.

Q. And about what was the scheme, if you can tell us, that he gave to you?

A. Which, the size and dimensions of the building

Q. Yes; and the changes that were to be made?

A. The dimensions of the building, I don't just remember, but you stated them, and he stated them as near, I think, as I remember them.

Q. That is approximately fifty-three feet long, or fifty-eight feet long?

A. Something about that; yes, sir.

Q. And about fifty feet wide when completed?

A. Yes, sir.

Q. Did he tell you whether or not he was working upon the building?

A. Yes, sir.

Q. What did he say?

A. He said he was at work building an addition to the store and also at work upstairs making rooms of it, putting in shelving in the old building, and doing general

carpenter work all through the structure.

Q. Did he tell you this before the policies were gotten out?

A. Yes, sir; some time."

5. The Court erred in holding that the plaintiff had not forfeited his right of action on the policy sued on in this action by keeping gasoline on the premises contrary to the provisions of said policy.

6. The Court erred in holding that plaintiff had not violated the provisions of the policy sued on herein by increasing the hazard after the issuance and delivery thereof.

7. The Court erred in holding that plaintiff had not violated the provisions of his policy by having carpenters and mechanics and workmen engaged in building the premises described in said policy for a period of over fifteen days after said policy was executed and delivered to plaintiff, without the consent of this defendant.

8. The Court erred in holding that plaintiff had not violated the provisions of the policy sued on in this action by employing carpenters in altering and repairing the said premises without the consent of this defendant, for a period of over fifteen days after the issuance and delivery of said policy.

9. The Court erred in holding that the work done upon said building was ordinary alterations and repairs and within the provisions of the policy.

10. The Court erred in overruling defendant's motion for judgment.

11. The Court erred in overruling defendant's mo-

tion for judgment notwithstanding the opinion filed by the lower court in this case.

12. The Court erred in overruling defendant's motion for a new trial.

13. The Court erred in entering judgment for plaintiff, for the reason that there was no evidence to support the same.

(Signed) W. W. HINDMAN,  
*Attorney for Defendant.*

Endorsements: Assignment of Errors.

Filed April 16, 1912.

W. H. HARE, *Clerk.*

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*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.)*

No. 1563.

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

Comes now the defendant herein and says that on the 5th day of April, 1912, this Court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.



WHEREFORE, the defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of record and proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

(Signed) W. W. HINDMAN,  
*Attorney for Defendant.*

Endorsements: Petition for Writ of Error.

Filed April 16, 1912.

W. H. HARE, *Clerk.*

*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division).*

No. -----

ORDER ALLOWING WRIT OF ERROR.

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

This 16th day of April, 1912, came the defendant by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth

Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the Court doth allow the writ of error upon the defendant giving bonds, according to law, in the sum of 6000.00 Dollars, which shall operate as a supersedeas bond.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Order Allowing Writ of Error.

Filed April 16, 1912.

W. H. HARE, *Clerk.*

---

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

No. -----

WRIT OF ERROR.

(Lodged Copy).

UNITED STATES OF AMERICA,

NINTH JUDICIAL CIRCUIT, *ss.*

The President of the United States to the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division,  
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said District Court, before you, or some of you, between Jacob Miller, plaintiff, and the Spring Garden Insur-

ance Company, defendant, a manifest error hath happened to the great damage of the said defendant, the Spring Garden Insurance Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, on the 15th day of May next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 16th day of April, A. D. 1912, and in the one hundred and thirty-sixth year of the United States of America.

Allowed by FRANK H. RUDKIN,  
*United States District Judge.*

(Seal) Attest: W. H. HARE,  
*Clerk of the United States District Court, Eastern District of Washington, Northern Division.*

Endorsements: Writ of Error (Lodged Copy).

Filed April 16, 1912.

W. H. HARE, *Clerk.*



*In the District Court of the United States, Eastern District of Washington, Northern Division (Successor to the Circuit Court of the United States for the Eastern District of Washington, Eastern Division).*

No. -----

BOND.

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

KNOW ALL MEN BY THESE PRESENTS: That we, the Spring Garden Insurance Company, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto Jacob Miller, plaintiff above named, in the sum of Six Thousand Dollars (\$6,000.00), to be paid to the said Jacob Miller, his heirs, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs and executors, jointly and severally by these present.

Sealed with our seal and dated this 16th day of April, A. D. 1912.

WHEREAS, the above named defendant, the Spring Garden Insurance Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above entitled cause on the 5th day of April, 1912, by the District Court of the United States, Eastern District of Washington, Northern Division, Successor to the

Circuit Court of the United States for the Eastern District of Washington, Eastern Division;

NOW, THEREFORE, the condition of this obligation is such that if the above named Spring Garden Insurance Company shall prosecute said writ of error to effect and answer all costs and damages, including just damages for delay and cost and interest on the appeal if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue. SPRING GARDEN INSURANCE COMPANY.

By W. W. HINDMAN, Its Attorney.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By F. W. PATTERSON, Its Attorney in Fact.

Approved this 16th day of April, 1912.

FRANK H. RUDKIN,

*District Judge.*

Endorsements: Bond on Writ of Error.

Filed April 16, 1912.

W. H. HARE, Clerk.

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*In the United States Circuit Court of Appeals for the Ninth Circuit.*

CITATION.

(Lodged Copy).

JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant.*

UNITED STATES OF AMERICA,

NINTH JUDICIAL CIRCUIT.*ss.*

To Jacob Miller, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, in said Circuit, on the 15th day of May next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Eastern District of Washington, Northern Division thereof, wherein you are Defendant in Error and the Spring Garden Insurance Company is Plaintiff in Error, to show cause, if any there be, why the judgment rendered against said Spring Garden Insurance Company, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank H. Rudkin, District Judge of the United States, sitting as Circuit Judge at Spokane, Washington, within the said Circuit, this 16th day of April, in the year of our Lord 1912, and in the Independence of the United States of America the 136th.

(Seal)

FRANK H. RUDKIN,

*United States District Judge, Sitting as Circuit Judge.*

Endorsed: Copy of Citation lodged with Clerk for Plaintiff in Error.

UNITED STATES OF AMERICA,

STATE OF WASHINGTON,

County of Spokane. ss.

Due and legal service of the within and foregoing citation is hereby accepted, in the City of Spokane, this 16th day of April, 1912.

(Signed) CANNON, FERRIS & SWAN,

*Attorneys for Jacob Miller.*



Citation (Lodged Copy).

Filed April 16th, 1912.

W. H. HARE, *Clerk.*

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*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

STIPULATION AS TO PRINTING RECORD.

JACOB MILLER,

*Plaintiff and Defendant in Error,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,

*Defendant and Plaintiff in Error.*

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the only parts of the record in this case hereinafter designated are material to the Assignments of Error made in this case, and that the said designated portions of the record, only, need be printed. The parts so designated are these:

1. Complaint.
2. Answer to Complaint.
3. Reply to Answer.
4. Opinion of the Court.
5. Motion for New Trial.
6. Order overruling Motion for New Trial.
7. Judgment.
8. Notice of filing Proposed Bill of Exceptions.
9. Bill of Exceptions.
10. Assignments of Error.
11. Petition for Writ of Error.
12. Order allowing Writ of Error.
13. Writ of Error.

14. Bond to Effect Writ of Error.
15. Citation and Return of Service.
16. Precaep for Transcript of Record.  
(Signed) EDELSTEIN & WEINSTEIN,  
(Signed) CANNON, FERRIS & SWAN,  
*Attorneys for Plaintiff and  
Defendant in Error.*  
(Signed) W. W. HINDMAN,  
*Attorney for Defendant and  
Plaintiff in Error.*

Endorsements: Stipulation as to transcript of Record.  
Filed April 16, 1912.

W. H. HARE, *Clerk.*

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*In the District Court of the United States, in and for the  
Eastern District of Washington, Northern Division.*  
JACOB MILLER,

*Plaintiff,*

*vs.*

SPRING GARDEN INSURANCE COMPANY,  
*Defendant.*

PRECIPE FOR TRANSCRIPT OF RECORD  
AND PRINTING THEREOF.

To W. H. Hare, Clerk of the Above Entitled Court:

Please have printed and transmit to the Clerk of the  
Circuit Court of Appeals, in accordance with a stipula-  
tion heretofore entered into by the parties to this action,  
and filed herein, the following papers:

1. Complaint.
2. Answer to Complaint.
3. Reply to Answer.

4. Opinion of the Court.
5. Motion for New Trial.
6. Order Overruling Motion for New Trial.
7. Judgment.
8. Notice of Filing Proposed Bill of Exceptions.
9. Bill of Exceptions.
10. Assignments of Error.
11. Petition for Writ of Error.
12. Order Allowing Writ of Error.
13. Writ of Error.
14. Bond to Effect Writ of Error.
15. Citation and Return of Service.
16. This Precipe for Transcript.

HAPPY, CULLEN, LEE & HINDMAN,  
*Attorneys for Defendant.*

Endorsements: Praecipe for transcript of record and printing thereof.

Filed April 16, 1912.

W. H. HARE, *Clerk.*

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*In the District Court of the United States for the Eastern  
District of Washington, Northern Division.*

No. 1563.

JACOB MILLER,

*Plaintiff,*

*vs.*

THE SPRING GARDEN INSURANCE COMPANY,  
a Corporation,

*Defendant.*

CLERK'S CERTIFICATE TO TRANSCRIPT OF  
RECORD.

United States of America,  
Eastern District of Washington, ss.



I. W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 138 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, bill of exceptions and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of the Writ of Error therein, in the United States Circuit Court of Appeals, and is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on the Writ of Error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$171.00, and that the said sum has been paid to me by Messrs. Happy, Cullen, Lee & Hindman, Attorneys for the Plaintiff in Error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 4th day of May, 1912.

(Signed) W. H. HARE,

Clerk.

(Seal)



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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JACOB MILLER,  
*Plaintiff and Defendant in Error,*

*vs.*

SPRING GARDEN INSURANCE  
COMPANY,  
*Defendant and Plaintiff in Error.*

---

ERROR TO THE DISTRICT COURT OF THE  
UNITED STATES, EASTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF PLAINTIFF IN ERROR.

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W. W. HINDMAN,  
*Attorney for Defendant and  
Plaintiff in Error.*

HAPPY, CULLEN, LEE & HINDMAN,  
Of Counsel.

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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JACOB MILLER,  
*Plaintiff and Defendant in Error,*  
*vs.*

SPRING GARDEN INSURANCE  
COMPANY,  
*Defendant and Plaintiff in Error.*

---

ERROR TO THE DISTRICT COURT OF THE  
UNITED STATES, EASTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This action was commenced on a policy of insurance, issued by defendant to plaintiff, covering property situated in the State of Washington. Judgment for plaintiff.

The policy contained the provision that

“This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if \* \* \* the hazard be increased by any

means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than 15 days at any one time, or if \* \* \* there be kept, used or allowed on the above described premises \* \* \* gasoline or benzine."

Also, on a typewritten slip or rider attached to the policy it was provided:

"Permission granted \* \* \* to make ordinary alterations and repairs."

And the policy contained a further provision that

"No officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such conditions or provisions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or condition affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The Answer to the Complaint set up three defenses:

First—That mechanics and laborers were employed for more than 15 days, to-wit, from October 18, 1910, to January 1, 1911, the date of the fire, in building, altering and repairing the premises described in the policy, contrary to the provisions thereof.

Second—That by so doing the hazard was increased.

Third—That gasoline and benzine were kept in the building, contrary to the terms of the policy.



By stipulation filed with the Clerk, waiving a jury, the case was tried by the Court.

The facts are undisputed, and are as follows:

At the time the policy sued on in this action was issued, one Chester H. Harvey was the local agent of the defendant company, at Spokane, Washington, to solicit insurance and countersign policies (Record, pp. 8-63-67). And at said time Rogers & Rogers were insurance agents and brokers representing insurance companies other than this defendant at Spokane (R., pp. 71-73). That at said time one Weidenbacher was in the employ of the said Rogers & Rogers, looking after their insurance department (R., pp. 62-63-73). That prior to the issuance of the policy in this action, one James H. Pool was an insurance solicitor (R., p. 62) representing Rogers & Rogers, and solicited insurance of the plaintiff, and after some negotiations Rogers & Rogers were authorized to place insurance on his property to an amount exceeding Ten Thousand Dollars (\$10,000.00), and that the companies in which the insurance was to be placed, and the amount in each company, was left entirely to Rogers & Rogers, or their agents (R., p. 64-65). That Rogers & Rogers placed all the insurance on the property owned by plaintiff that the companies represented by them would carry (R., p. 65), and they, on behalf of plaintiff, applied to Chester H. Harvey, the local agent of this defendant, to issue insurance thereon, and in pursuance of the said request the said Harvey executed and delivered to said Weidenbacher, the said agent of Rogers & Rogers, the policy sued on in this

action (R., pp. 62, 65, 66, 73). That prior to the execution and delivery of said policy the plaintiff had a conversation with said Pool relating to the remodeling of the building mentioned in the policy, and Miller testified that he drew him a rough sketch and told him what the size and dimensions of the building would be when completed, and told him he was working on the building at that time (R., pp. 46-49). The time of this conversation was not fixed by the testimony. Pool's testimony corroborated Mr. Miller (R., pp. 60-61). That at the time or shortly after the issuance of this policy Mr. Harvey sent in his daily report to the company's office at Seattle, Washington, on which report was shown the location of the building mentioned in the policy, in reference to other buildings in that locality, and in said report stated that he had personally inspected the risk and that the building was three (3) months old and in good repair (R., p. 122). That prior to the issuance of the policy the building in question was a two-story frame building, 20 feet wide by 58 feet long (R., pp. 39-40, 98), the second story of which was used as a dance hall (R., p. 42), and about the middle of October, 1910, mechanics and laborers were employed to do work thereon and therein; that the second story was converted into a hotel or rooming house and was entirely remodeled, and new floors were put in, and it was partitioned off into rooms, leaving a hallway running entirely through the building (R., p. 42). The stairway going up to the dance hall was formerly on the outside of the building, but was changed during the time herein mentioned to the inside of the building (R., pp. 39, 98). A

room was partitioned off in the back part of the building for the purpose of storing oil and other merchandise (R., p. 39). And an addition or building 30 ft. by 58 ft., with a shingled roof, was built onto one side of the building (R., p. 39, 85, 94). The walls or partitions were taken out, converting the said building into one entire room, save and except as to the room in the back of said building (R., p. 38). Shelvings were built on the side of the walls (R., p. 43), and the inside was entirely remodeled (R., p. 85). A porch was built across the entire front of the building (R., p. 98). The door in the front part was changed so as to put it in the center of the building as constructed, and the old door closed, and the old windows in the old building were also closed and large windows were also put in, on each side of the door (R., p. 98). Steps were built up to the porch; the entire building was painted, and its appearance entirely changed. A good portion of the time as many as ten men were employed in said work (R., p. 41, 44), and at no time less than three (R., p. 44). And said improvements cost plaintiff from \$4500.00 to \$5000.00 (R., p. 85). That said work was all being carried on at one time (R., p. 44), and continuously to the date of the fire, to-wit, on January 2d, 1911 (R., pp. 87, 101), and it was done in pursuance to a plan laid out by plaintiff prior to the commencement of the same.

The merchandise owned by plaintiff, and insured under the policy, was delivered in the building by November 20th, 1910 (R., p. 45), and was promiscuously scattered about the room (R., p. 40, 97). The men employed by plaintiff were constantly working in and



among said goods during all of said time (R., p. 40). Said men were permitted to and allowed by plaintiff to smoke (R., p. 97), and shavings were permitted and allowed to accumulate in the building by plaintiff. That plaintiff, after the execution and delivery of the policy sued on in this action, and prior to the fire, put in said building, and kept therein, a five gallon can of gasoline. Plaintiff was arrested for burning the building, tried and acquitted by a jury (R., p. 34).

At the close of the hearing defendant moved for judgment in its favor, which motion was overruled (R., p. 117), and at the time of the argument of the case the defendant moved the Court to enter judgment in its favor, for the reason that the evidence introduced showed that the plaintiff had violated the conditions of his policy by keeping gasoline on his premises, which motion was overruled, and defendant excepted (R., p. 117); and defendant further moved the Court to enter judgment in its favor for the reason that plaintiff employed mechanics in the building altering or repairing said premises for a period of more than 15 days, contrary to the provisions of the policy, which motion was overruled, and defendant excepted (R., p. 117); and after the opinion of the Court was written and filed, and before judgment was entered, defendant moved for a judgment in its favor, notwithstanding said opinion, which motion was denied, and defendant excepted (R., p. 118).

## ASSIGNMENT OF ERRORS.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred upon the trial of this case, to-wit:

### I.

That the lower Court erred in overruling defendant's objections to the following questions asked plaintiff Miller:

"I want to know if you had any conversation with any insurance agent prior to the 18th day of November, and if so with whom?" (R., p. 45).

Which was answered as follows, to-wit:

"My first conversation was with a man by the name of Pool. He was an insurance man, an agent. I proposed to him that I was going to build a store, that store at Camden, so that he was coming in early in October; he came in and he wants to get that insurance for Rogers & Rogers. I told him I was not ready to give any insurance at all; I build my building first up; so he takes a pencil and he tells me how the building will be; \* \* \* I told him I am going to build a general merchandise store up there. \* \* \* I tell him I will not give any insurance until I build up my place first. \* \* \* He takes a pencil and I showed him how I was going to build up that place."

Q. "And you showed him what you were going to build up there?"

A. "I showed him what I was going to build; all exactly what I showed him." (R., pp. 46-49).

### II.

The Court erred in making the following ruling on the objections to said testimony, to-wit:

The Court: "Under the decisions of the Supreme

Court of this State, the insurance companies, through its agents, having notice that the building was under construction at the time the policy was issued, I think it is doubtful if you can take advantage of this provision, and I doubt if you can avoid it unless the policy really so provides." (R., p. 46).

### III.

The Court erred in denying defendant's motion to strike the testimony of plaintiff Miller as to his conversation with Rogers & Rogers, or their agents, prior to the issuance of the policy, for the reason that it was shown by his testimony that Rogers & Rogers, or their agents, were Miller's agents. (R., p. 47-59).

### IV.

The Court erred in overruling defendant's objections to the following questions and answers given by one Pool, a witness on behalf of plaintiff, to-wit:

"Q. Later on and prior to the issuance of the policy did you have any conversation with him relative to remodeling the two story building?

A. Yes, sir; that is an addition to the old building.

Q. State whether or not he drew you a plan of it?

A. Yes, sir.

Q. Or a rough sketch, I mean?

A. Yes, sir.

Q. And about what was the scheme, if you can tell us, that he gave to you

A. Which, the size and dimensions of the building?

Q. Yes; and the changes that were to be made?

A. The dimensions of the building, I don't just remember, but you stated them, and he stated them as near, I think, as I remember them.

Q. That is approximately fifty-three feet long, or fifty-eight feet long?

A. Something about that; yes, sir.



Q. And about fifty feet wide when completed?

A. Yes, sir.

Q. Did he tell you whether or not he was working upon the building?

A. Yes, sir.

Q. What did he say?

A. He said he was at work building an addition to putting in shelving in the old building, and doing gentle store and also at work upstairs making rooms of it, eral carpenter work all through the structure.

Q. Did he tell you this before the policies were gotten out?

A. Yes, sir; some time." (R., pp. 60-61).

#### V.

The Court erred in holding that the plaintiff had not forfeited his right of action on the policy sued on in this action by keeping gasoline on the premises contrary to the provisions of said policy.

#### VI.

The Court erred in holding that plaintiff had not violated the provisions of the policy sued on herein by increasing the hazard after the issuance and delivery thereof.

#### VII.

The Court erred in holding that plaintiff had not violated the provisions of his policy by having carpenters and mechanics and workmen engaged in building the premises described in said policy for a period of over fifteen days after said policy was executed and delivered to plaintiff, without the consent of this defendant.

## VIII.

The Court erred in holding that plaintiff had not violated the provisions of the policy sued on in this action by employing carpenters in altering and repairing the said premises without the consent of this defendant, for a period of over fifteen days after the issuance and delivery of said policy.

## IX.

The Court erred in holding that the work done upon said building was ordinary alterations and repairs and within the provisions of the policy.

## X.

The Court erred in overruling defendant's motion for judgment.

## XI.

The Court erred in overruling defendant's motion for judgment, notwithstanding the opinion filed by the lower Court in this case.

## XII.

The Court erred in overruling defendant's motion for a new trial.

## XIII.

The Court erred in entering judgment for plaintiff, for the reason that there was no evidence to support the same.

## ARGUMENT.

It will not be logical to discuss the assignments of error in their chronological order, so we take up first the assignment of error numbered III, that the Court erred in denying defendant's motion to strike the testimony of plaintiff Miller as to his conversation with Rogers & Rogers, or their agents, prior to the issuance of the policy, for the reason that they were the agents of Miller, and not the agents of this defendant.

It will be seen by reference to the testimony that they were employed by the plaintiff to place insurance on his property for a given amount, and the companies in which the insurance was to be placed, and the amount in each company, was left entirely to them, or their agents. They placed all the insurance on the property of plaintiff that the companies represented by them would carry, and they, on behalf of the plaintiff, applied to the local agent of this defendant to issue further insurance thereon, and in pursuance to that request this policy was issued and delivered by said Harvey to Weidenbacher, the said agent of Rogers & Rogers. In this transaction we submit that Rogers & Rogers acted as broker for plaintiff. That they were his agents, and any knowledge received, or communications made to them, unless communicated to this defendant, or its agents, could not bind this defendant, and there is no testimony in this case showing that any such communication was made to the said Harvey or this defendant. It is unnecessary to say that the burden of proof, to show waiver, if any there was, rests with the plaintiff, and he failed to make any such proof. That Rogers & Rogers were the agents



of plaintiff, and not of the defendant, is supported by an unbroken line of authorities.

As said in

*Clement on Fire Insurance*, Vol. 2, p. 532:

“A broker is ordinarily an agent of the insured, and not of the company; hence, in the absence of evidence clothing him with authority by the company, payment of the premium to him is not a payment to the company; nor is the insurance company bound by any credit or arrangement or waiver made by the broker with the insured.”

See also:

*Travelers' Ins. Co. v. Thorne*, 180 Fed. 82;  
*Hamblet v. City Ins. Co.*, 36 Fed., 118-122;  
*Pottsville Mutual Fire Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. St., 140.

Assignments of error numbered I, II and IV can be discussed together as going to the same question.

Assuming that Rogers & Rogers were the agents of this defendant in the transaction referred to, the Court erred in permitting parole testimony to be received of conversations had with them, or notice received by them, prior to the issuance of a policy, for the reason that said testimony cannot be received to vary or contradict the plain terms and conditions of the policy, and for the further reason that any alleged waiver of the terms and conditions of the policy must be endorsed thereon, and testimony of any such alleged waiver could not be received unless the same was so endorsed.

This proposition has been settled so many times by the Federal Courts that it hardly seems necessary to cite authorities thereon, but see the latest expression of the

Supreme Court of the United States in the case of

*Penman v. St. Paul Fire & Marine Ins. Co.*, 216  
U. S., 311,

where the local agent knew of the breach at the time the policy was issued, charged an additional premium for the increased hazard, and an inspector of the company afterwards inspected the risk and was told the reason why the increased premium was charged, and made no objections thereto, but the Court held that such testimony was inadmissible.

See also the decision of this Court in

*Kentucky Vermillion Mining & Concentrating Co. vs. Norwich Union Fire Ins. Society*, 146  
Fed. 695.

As this case was tried by the Court, without a jury, ordinarily the letting in of incompetent testimony is of little moment, as the Court will sift the chaff and take the kernel, but we submit that the lower Court's decision was influenced by this testimony, for in his opinion he says:

"While the work was in progress the plaintiff was beset by insurance agents, who desired to insure his property. After numerous conferences the policy in suit was written, on the 17th day of November. At that time the remodeling of the building was in progress and the agent of the company was fully advised as to the contemplated changes, and, according to their report to the company, visited the building in person."

How did he know this unless he took into consideration the testimony so received? And why was it necessary to review such testimony unless the Court considered it important to his final conclusion and necessary to his ultimate decision? The Court, however, was in

error in making this statement if he intended to refer to defendant, or its agents. The agents, if any, whom he says "beset" the plaintiff were not the defendant's agents, but were the agents of other companies. The agents, if any, who knew that the work was in progress were not the defendant's agents, but were also the agents of other companies. The numerous conferences had prior to the 17th day of November, if any, were had with agents also of other companies, and they were the only ones that knew that the building was in progress or of the contemplated changes, and there is absolutely no testimony in the record showing that this defendant, or its agents, had any such knowledge, save and except the report of the local agent, Harvey, to the office at Seattle that he had personally inspected the risk, and that the building was three months old and in good repair, which statement, however, does not in any degree bear out the broad statement made by the lower Court nor tend in the least degree to show that the agent had any knowledge whatever of the facts as they existed, but was misinformed as to the conditions. (See Record, p. 70). It will be remembered that all conversations and negotiations relating to this insurance were had with Rogers & Rogers, or their agents, and that this policy was issued by the local agent of this company on their application, and Miller at no time had any conversation with defendant's local agent, nor, so far as the testimony shows, did Rogers & Rogers, or their agents, have any conversation with him, other than asking him to issue the policy sued on herein.

But assuming, for the sake of argument, that said tes-



timony was properly received, and that this defendant company had notice that the work was in progress at the time that it issued the policy, does this in any way change the condition? We think not. The policy provided that

“If mechanics be employed in building, altering or repairing the within described premises, for more than 15 days at any one time”

without permission endorsed thereon, that it should be void. This gave the plaintiff 15 days in which to do said work, without further permission, and even if defendant knew that plaintiff was doing the work, it could not have objected, for it gave such permission, and this defendant would have the right to presume that plaintiff would finish the work within that time or would stop when his time was exhausted or get permission to continue further.

As said in:

*German Ins. Co. v. Hearne*, 117 Fed. 289, at 292:

“In effect, the company said to the insured: In order that there may be no room for question in the future, concerning the character and extent of the work that may be done upon the insured premises, we agree that you may do whatever you please to the building, whether the change would be accurately described as building, or as altering, or as repairing, without asking our consent, and without being obliged to consider whether or not the risk is thereby increased; and you may do this for fifteen days. But if the work you do is so extensive that it requires more than fifteen days to finish it, then we require you to give us notice in order that we may take such steps as we may then see fit. We shall then have knowledge of what you are doing. And we can decide whether it may go on, or whether it is so dangerous as to require us to cancel the policy altogether, or to demand that the increase of hazard shall be com-

pensated by an increase of premium. This, we think, is the true meaning of the clause in question."

See also:

*Imperial Fire Ins. Co. v. County of Coos*, 151  
U. S. 452.

This question has been passed on by many Courts, including this one, in accordance with our contention.

In the case of

*Conn. Fire Ins. Co. v. Tilley*, 29 Am. St. Rpts.,  
770 (Va.),

the Court said:

"It is contended by the defendant in error that the company waived the non-occupancy clause by insuring the buildings when vacant. We do not think this is so. The policy allows 20 days to get the building occupied, as they were new and just nearing completion in the construction. This was a waiver for 20 days only, and an express insistence on the non-occupancy clause afterwards. This was the obvious effect of the said provision of allowing 20 days to get them occupied, and in this respect is unlike the cited cases. \* \* \* The limit of 20 days is fixed by mutual agreement, during which the company agrees to waive the non-occupancy clause, after which time the insured agrees to notify the company of any occurring vacancy."

See also:

*Kentucky Vermillion M. & C. Co. v. Norwich Union Ins. Society*, *Supra*, and cases cited therein.

*England v. Westchester Fire Ins. Co.*, 29 Am. St. Rpts. 917.

But the lower Court, in passing upon this question, said:

"At the time of the issuance of the policy, improvements were under way which would continue for more

than the 15 day period, and it became necessary to make some other provisions to meet the existing conditions.” (R., p. 26).

✓ In the making of this statement the Court was again in error. There is absolutely no testimony in the record showing or tending to show that it was known, or that it was thought or contemplated, at the time of the issuance of this policy—assuming that any knowledge or communication had or made to Rogers & Rogers would be communication to the defendant company—that the work then being done would continue for more than fifteen days, or that would show why the rider permitting ordinary alterations or repairs was attached to the policy, other than the fact that it was so attached. The only testimony on this question is fully set out in assignments of Error numbered I and IV, and it is not necessary to again quote it here, but it will be found on pp. 46, 60 of the Record. We most respectfully say that the Court went out of the record in making this statement, as it was not warranted by the facts. The rider attached to this policy was a stock clause, attached to all policies of insurance, and by all companies, in varying forms, in order to save the assured the time or trouble of getting permission to keep his property in repair or make ordinary alterations thereon, and its attachment to the policy in this action carries with it no significance. We ask the permission of this Court to go out of the records to show the provisions contained in other policies of insurance, issued by other companies, as further illustration of our contention. Originally some of the companies issued policies containing the provision that



“Ordinary alterations, repairs and building permitted. Extraordinary alterations, repairs and building prohibited.”

The latter part of this provision was afterwards omitted. Among the stock clauses now generally used by insurance companies are as follows:

“Privilege of existing hazards, and others not greater, and for mechanics to make ordinary alterations, enlargements, additions and repairs”;

“Additions, alterations and repairs permitted without notice”;

“Permission granted to make alterations, additions, improvements and repairs, without limit of time and without notice to this company.”

Nearly all companies add to this stock clause the permission to “make additions,” “to build,” etc., but in the policy in question the permission “to build” was left out of the stock rider attached to this policy.

We submit, therefore, that the Court was not justified in drawing the conclusion that

“The object of this clause was to provide for the repairs or alterations then in progress.” (R., p. 27), or that such provision authorized anything but ordinary alterations and repairs.

Assignment of error numbered VIII. The Court erred in holding that plaintiff had not violated the provisions of his policy by having carpenters and mechanics and workmen employed in “building” the premises described in said policy for a period of over fifteen days, without the consent of this defendant.

As we have said, the body of the policy prohibited for more than fifteen days the employment of mechanics

“in building, altering or repairing the within described premises” without written consent. This provision was modified by the rider attached to the policy, which, without limit, permitted “Ordinary alterations and repairs.” The word “building” as originally contained in the policy was not affected by said rider, nor was it changed, or attempted to be changed, thereby. So, if the work that was done constituted a “building” within the meaning of the policy, plaintiff cannot recover, as a breach of all or any one condition of the policy voids it as a whole.

As this Court said in the case of

*Kentucky Vermillion M. & C. Co. vs. Norwich Union Fire Ins. Society, Supra,*

quoting from the

*Imperial Fire Ins. Co. v. County of Coos, Supra:*

“The terms of the policy constitute the measure of the insurer’s liability, and in order to recover, the assured must show himself within those terms, and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. \* \* \* The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. \* \* \* It is entirely competent for the parties to stipulate, as they did in this case, ‘that this policy should be void and of no effect if, without notice to the company, and permission therefor endorsed hereon \* \* \* the premises shall be used or occupied so as to increase the risk, or cease to be used for the purposes stated herein \* \* \* or the risk be increased by any means within the knowledge or control of the assured.’ \* \* \* These provisions are not unreasonable. \* \* \* These terms and condi-

tions of the policy present no ambiguity whatever. *The several conditions are separate and distinct, and wholly independent of each other.*" (Italics ours).

We contend that what was done was a "building" within the meaning of the policy and is fatal to plaintiff's right of recovery, as it is not disputed that this work was continued for more than fifteen days after the issuance of the policy, or until January 1st, 1911, and if a "building," that no permission was given the plaintiff to vary from the terms and conditions of the policy. The facts in reference thereto have been set out fully in the statement, and it is not necessary to refer to them again in full.

In the case of

*Frost Detroit Lumber Works v. Miller's Mutual Insurance Co.*, 34 N. W., 35 (Minn.),

which was cited with approval in the

*Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 468,

the defense in that case was that the work done on the building was not necessary alterations or repairs within the provisions of the rider attached thereto. The building was originally 53 ft. wide by 200 ft. long, and it was enlarged on one side so as to make it 12 ft. wider throughout. The facts, therefore, are very similar to the facts in this case.

The Court said:

"While the written provision of a contract should prevail over one which is inconsistent with it, and which is part of a printed form adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way. We are unable to construe this writing



as wholly inconsistent with, or as intended to wholly do away with, the requirements expressed in the printed condition, that if the building be 'altered, added to or enlarged,' notice must be given and consent endorsed. It is operative to qualify the provision respecting alterations merely, without necessarily affecting that respecting additions or enlargements. Necessary alterations and repairs upon the existing structure, whatever such 'alterations' might properly include, was authorized; but not a material enlargement of the whole building such as was made in this case."

"There was evidence directed to showing that this enlargement was contemplated by the assured when the contract was made, and that the agent was advised of this at the time. The building was in process of construction when the insurance was effected, and the contract of insurance should be applicable, not only to the incomplete structure, but to the building when completed. But, as we understand the evidence, this addition can hardly be deemed to have been a completion of the process of construction, but the enlargement of an already complete structure. It was made long after the original structure was completed, and involved the tearing down of one side of the same 200 feet in length. As we understand the facts sought to be shown, the proof was incompetent under the rule which forbids oral evidence to vary the terms of a written contract."

- The Supreme Courts of Pennsylvania, Georgia and New Jersey, in construing the words "building" or "alterations and repairs" under a mechanics' lien law, have given us a guide to follow.

In Hancock's Appeal, reported in 7 Atl., 773 (Pa.), the Court said:

"It was repeatedly held that, under the Act of 1836, a lien would not lie for repairs and alterations, unless, as was subsequently held in *Driesbach v. Keller*, 2 Pa. St., 77, and in *Armstrong v. Ware*, 20 Pa. St., 519, 'The structure of a building is so completely changed that in

common prudence it may be properly called a new building or a re-building.' ”

And in the case of

*Driesbach v. Keller*, cited in that case,  
the Court said:

“The lien given by law to the mechanic is for work done in the erection of a building, and the question is whether it is legally to be considered as the erection of a building, or as merely the repair of an old one, to which no lien is given. Repairs may be slight, or, in some cases, they may be very considerable, and carried to such an extent as, in fact, to amount to the erection of a new building, different in its capacities and character from the old one. In extreme cases there can be no difficulty in determining in which class to rank it, either as merely repairing or restoring an old building to its original state, or, as, in effect, constituting another building. Even a slight addition, manifestly subservient to the original edifice, might, perhaps, be merely a repair. But a substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though some portions of the old are preserved and incorporated in the new.

“Here was originally a one story house. The defendant had a new story put upon it, and lengthened it so as to make it all into one building, two stories high, covered by one new roof, and twice the front of the former house. This, we think, constitutes such a change of the house as to render it substantially and essentially a new erection, and, therefore, subject to the lien of the mechanic’s claim.”

In the case of

*Willis v. Boyd*, 29 S. E. 707 (Ga.),  
the Court quoted with approval

*Hershey v. Shenk*, 58 Pa. St., 384,  
as follows:

“The first assignment of error is to the charge of the

Court below upon the question of the liability of the building to the liens of mechanics. The instruction to the jury was: 'If you believe from the testimony that there was a radical change made in the form and appearance of the house, as the testimony seems to indicate, and as is manifested by the taking out of the gable end of the old building, extending the same, and enlarging it so much as to make two houses, and also materially altering the internal structure of the building, besides adding two buildings which were to be used as kitchens, then we think those alterations and additions would make the building subject to the lien'; that is to say, in other words, that if the jury believed these facts to have been substantiated by the evidence, it was, in point of law, a new erection. This instruction is fully sustained by all the authorities."

The case of

*State v. Long Branch Com'rs*, 25 Atl. 274 (N. J.), was a criminal prosecution for the violation of an ordinance forbidding the erection of wooden buildings. The question was whether what defendant had done amounted to "the erection of a building." He owned a frame building, one story and an attic in height, 14 feet fronting on Broadway, and 24 feet deep, standing on wooden piers. This he changed by moving it back a little, by taking out the front and putting on a new one, by extending the lower story about seven feet laterally along Broadway, by substituting a full second story for the attic, making the roof three or four feet higher than before, and extending the second story about ten feet along Broadway, so that it projected about three feet below the lower story. Afterwards, by a separate contract, he built on a one story kitchen, 10x12 ft., in the rear.



The Court said:

"The principle to be applied in determining whether work of this character constitutes the erection of a building is not easily formulated. In *Combs v. Lippincott*, 35 N. J. Law, 483, Mr. Justice Woodhull said: 'While it must be admitted that a building may be greatly changed in structure, in the materials which enter into it, and in its internal arrangements, without at all losing its identity or ceasing to be the same building, it can hardly be denied, I think, that it may be so entirely changed in plan, in structure, in dimensions, and in general appearance, as to become, in a fair sense and according to the common understanding of men, another building—a new building.' The same idea, of making the common understanding the test for distinguishing between the mere reparation of an old building and the construction of a new building out of an old one, seems to be adopted in Pennsylvania, where the subject has received frequent examination." Citing authorities.

And the Court, continuing, says:

"Applying this rule to the circumstances of the present case, I think the judgment of the police justice may be justified with reference to the main building. Considering the change in position, the new front, the increased width, the greater elevation, the different internal arrangements necessitated thereby, and the great alteration in outward appearance resulting therefrom, the structure might, according to common understanding, in common parlance be called a 'new building.'"

The facts in this case are substantially the same as the facts in the cases above referred to. The arrangement and use of building was entirely changed; the doors and windows of the building were also changed. A new porch was built on. The building was painted. The stairs were moved from the outside to the inside of the building. The upstairs was changed from a dance hall into a lodging or rooming house. The building, which

was originally 20 ft. by 58 ft., was changed into a building 50 ft. by 58 ft., or 10 ft. more than double the original frontage. From three to ten men were continuously employed for a period of two and one-half months, and the work done costing from \$4500.00 to \$5000.00.

We submit that this constitutes a "building" within the meaning of the policy. If it did not, then the adding to the building of an addition 30 ft. by 58 ft. did constitute a "building" under its terms, as this work continued for more than thirty days.

As said in

*State v. Long Branch Com'rs, Supra:*

"But there is another fact to be borne in mind. The kitchen in the rear was entirely new, and was a new building, unless its being intended as an adjunct to the main building deprived it of that character. But it is not necessary that the new building should be distinct from and independent from the older building in order to be deemed 'a building' erected. Thus wings added to a house are regarded as buildings. *Nelson v. Campbell*, 28 Pa. St., 156; *Harman v. Cummings*, 43 Pa. St., 322. So, also are kitchens attached to dwellings. *Lightfoot v. Krug*, 35 Pa. St., 348; *Pretz and Gausler's Appeal*, i. d., 349. Our conclusion is that the plaintiff has violated the ordinance and his conviction must, therefore, be affirmed, with costs."

See further upon this question the case of

*Robb v. Miller's Mutual Fire Ins. Co.*, 79 Atl., 150 (Pa.).

Assignments of error numbered VIII and IX. What constitutes "ordinary alterations and repairs"?

We contend further that work done on this building was not "ordinary alterations and repairs," and if it

did not amount to a "building" then it was extraordinary alterations and repairs, and is equally fatal to plaintiff's right of recovery. The lower Court said that these words were "not ambiguous." But, after so holding, again takes into consideration parole evidence as to the work being in progress at the time of the issuance of the policy, and conversation had with agents, in order to construe their meaning. We had supposed that when it was once determined that these words were not ambiguous, they should then be construed in accordance with their generally accepted meaning, unaided by extrinsic evidence.

This Court, in

*Kentucky Vermillion M. & C. Co. v. Norwich Union Ins. Society, Supra,*

quoted with approval the following language:

"The obvious meaning of their plain terms is not to be discarded for some curious hidden sense which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken in their plain, ordinary and popular sense."

Ordinary means "usual, often re-occurring."

*Chicago & A. R. R. Co. v. House*, 50 N. E., 151-153 (Ill.)

Can it be for a moment contended that the work done upon this building was "usual" alterations or repairs? Do men usually change a dance hall into a hotel, building on an addition 30 feet wider than originally built, tear down a partition between the old and new build-



ings and put it into one large room; put on porches, change the outside windows and doors, paint the entire building, and completely change its appearance, all at a cost of from \$4500.00 to \$5000.00? The lower Court didn't say that this was ordinary alterations and repairs, and the plaintiff has never so contended, but his counsel stated to the lower Court:

"We will take the position that the clause of the policy prohibiting the employment of mechanics on the building would avoid the policy, undoubtedly, if the changes were made after the policy was written, but since the agent knew the condition in which the building was when they wrote the policy, since they knew that we were at work upon the building at that time, that fact does not avoid the policy." (R., p. 35).

and we do not believe that it can be successfully contended that it is. If this were not extraordinary alterations, then what could be done to the building that could be construed as such? The "plain, ordinary sense" of "ordinary alterations and repairs" to a building are generally taken to mean those changes which are necessary to a building in its then state, to the proper and convenient use of the same—to change within the four walls the arrangement thereof, to modify or vary in some degree, such as taking out partitions, the changing of windows, doors and the like, and it does not include building of additions thereon.

As said in

*Grosse v. Barman*, 100 Pac., 348, 352 (Cal.):

"As we interpret the agreement the term 'the costs of \* \* \* alterations made upon the building,' as used, therein, applies not to additions to the building," etc., and

the work performed did not constitute "ordinary repairs."

As said in the case of

*Citizens' Bank of Louisiana v. Miller et al.*, 10 So., 779, 782 (La.):

"No doubt some of the improvements claimed belong to the class of ordinary repairs, merely intended to preserve the status quo, which the possessor was bound to make."

And again, in the case of

*Abell v. Brady*, 28 Atl., 817 (Md.):

"All buildings are subject, more or less, to natural and unavoidable decay, and 'ordinary repairs,' when used in reference to buildings, means expenses reasonably incurred in keeping the property in good condition and order."

See also:

*Braum v. City of Troy*, 60 Barb. 417 (N. Y.).

#### Assignment of error IV.

We submit that the facts conclusively show that there was an increase of hazard, without defendant's consent. The goods insured were placed in the building by November 20th, and were promiscuously piled and scattered about the room (R., pp. 40, 97). As high as ten men at one time were employed by plaintiff in carrying on the work of construction, and working among and around the goods. Lumber was sawed and planed therein (R., p. 97), shavings were allowed to accumulate (R., pp. 97, 99), and the laborers were allowed to smoke (R., p. 97), and, of course, in so doing, used matches, and it must follow that the possibility of the

property being destroyed by fire was, by said acts, materially increased.

Assignment of error numbered V, that plaintiff breached his policy by keeping gasoline in the building.

He was examined shortly after the fire, and was represented on said examination by his present counsel, Mr. Weinstein (R., p. 81). His testimony was as follows:

Q. Did you have any gasoline?

A. Yes, sir; five gallons of gasoline; five gallons at a time in the store. (R., p. 89). \* \* \*

Mr. Weinstein: Q. That place where you kept the kerosene there was a special place built for that, was there, at the end of the building?

A. At the end of the building, yes sir. (R., p. 90). \* \* \*

Q. Did you keep any other explosives there?

A. I kept turpentine for sale, and one can gasoline for sale. I sold one gallon to that Blind Pig outfit. (R., p. 91).

And on the next day he was called again to the stand and drew a diagram in order to show the exact place in the building where the oil was kept (R., p. 78). (See Folger's testimony, p. 92). And he testified:

Q. Was there any other oil there that you kept, or explosives that you kept?

A. Not around there; no, sir; the oil was in a side—like this right over here—and the oil was in this side in the corner.

Q. In the side of the house in the corner?

A. In the corner. (R., p. 92).

Mr. Weinstein: That is the same question I asked you yesterday?

Witness: Yes, sir. It is the same.

Q. What I am trying to get at, this gasoline you had there was not near the fire?

A. No, sir. I will show you on a piece of paper if



you wish (illustrating by drawing on paper). Now, this was the building. \* \* \* Now from this side that was the center door; all back of this building was one hall like this. You see, this was a hallway from here up from in the back, another door. You could go out this way, and that was the oil stand.

Mr. Weinstein: Store-room practically built?

A. Store-room for that on the same store. Only partitioned. \* \* \*

Q. Now you say there was a door between this and this partition.

A. This was a big store; that is the main part of the store.

Q. The door to this place where you kept your oil?

A. Yes, sir.

Mr. Weinstein: A door into this room, and a door into this room, which was a partition separate to keep the oils separate, then another door that led up to the stairway going upstairs.

Q. This here, then, was a partition built onto the main store?

A. Yes, that was.

Mr. Weinstein: Two entrances \* \* \* one here and one here, which led through this store-room, the oil store-room.

Mr. Hindman: The oil store-room?

Mr. Weinstein: Yes, sir.

Mr. Weinstein: The witness drew this plan for me so many times that I can tell you. When he built this addition to the store the idea was to keep oil, and in order to do that he knew that he would have to keep it away from the store proper, so, therefore, he built a partition away from the store, which would lead to the rear entrance going upstairs, and also have an entrance into the store.

The Witness: \* \* \* I left that partition right in there for keeping the oil separate from the building; from the main part. (R., pp. 93-9).

The plaintiff, in his testimony before the lower Court, did not in any material way contradict his former sworn statement. He testified that he had gasoline and tur-

pentine for sale to the general public. (R., pp. 111-112).

Q. And that was for the purpose of selling to the people that came in there?

A. Yes, sir.

Q. Now, why did you keep your oil outside, if you had your turpentine and oils in this?

A. This man took it up and put it here when he had it in the other store, because he needed it for mixing paints. (R., p. 112).

This statement is therefore corroborated that he had the gasoline in the main building and that it was afterwards taken out by Davis for the purpose of mixing paints, and Davis, in his testimony, stated that that was the reason why the oils were taken into the outer building. (R., p. 104).

Miller further testified:

Q. That room, oil room, that you had back there, was built especially to keep oils in, wasn't it?

A. Especially for certain oils. When people took it out of there I didn't know it.

Q. It was for the purpose of keeping oils in?

A. All kinds of oils. I couldn't tell you what kind of oils has been put in. As this man Davis worked for me he just took a lot of oils, whatever he saw fit to.

Q. It was built for the express purpose of keeping oils in, wasn't it?

A. That was for kerosene, I suppose. \* \* \* It was for everything. \* \* \* It was for oils, but there were no oils in there.

Q. And you had your oils in the store-room?

A. Yes, sir. There was out there in the back. (R., p. 113).

The Court will see that he contradicts himself throughout in his statements before the lower Court. He also testified that he kept all merchandise which he had for sale in the store proper. (R., p. 113-114).

These statements made before the lower Court after

the making of his former sworn statement, and after the defense put in in this case that the policy was breached by the keeping of gasoline in the building, and made by a party so deeply interested in the result of the litigation, we submit that if it is in any way contradictory to his former statements that it is not sufficient to overcome it. It is true that on behalf of plaintiff one Davis testified that he took from the depot a five-gallon can of gasoline and turpentine and put it in an outside building (R., p. 103), and that Mrs. Miller, wife of the plaintiff, testified that after the fire a five-gallon can of gasoline was taken out of the building adjacent to the store and taken to the ranch (R., p. 105). Of course, this testimony in no way contradicts or explains the former sworn statement of the plaintiff that he had a five-gallon can of gasoline in the store, as he could still have had it there and still had another five-gallon can in another building. We respectfully submit that the Court erred in holding that this defense was not proven.

As to assignments of error numbered X and XI, XII and XIII, it is not necessary to discuss, for if the propositions heretofore discussed are decided in our favor, it necessarily follows that these assignments of error are well taken.

We respectfully submit that the decision of the lower Court is wrong and should be reversed.

W. W. HINDMAN,

*Attorney for Defendant and  
Plaintiff in Error.*

HAPPY, CULLEN, LEE & HINDMAN,

Of Counsel.



IN THE  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
FOR THE  
**Ninth Circuit**

JACOB MILLER,

*Plaintiff and Defendant in Error,*

*vs.*

SPRING GARDEN INSURANCE COM-  
PANY,

*Defendant and Plaintiff in Error.*

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*Error to the District Court of the United States, Eastern  
District of Washington, Northern Division.*

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BRIEF OF DEFENDANT IN ERROR.

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CANNON, FERRIS & SWAN and

EDELSTEIN & WEINSTEIN,

*Attorneys for Defendant in Error.*

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FILED



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ARGUMENT.

We believe little good can be accomplished by an enlargement upon the Statement of Facts contained in the brief of plaintiff in error. The questions of fact decided by the Court were, we think, all justified by



the preponderance of the evidence. The trial Judge had the witnesses before him and can better judge of their credibility. This is especially true of the testimony of Mrs. Miller (T. R., 105 to 110) and the testimony of Mr. Poole (T. R., 59 to 67), and the testimony of Mr. Miller that the gasoline and turpentine had been taken to his house.

It appears that before the insurance was written the agents of the insurance company knew that Mr. Miller, the plaintiff, was altering and remodeling the building. They were fully informed by him of the extent of these alterations and of the remodeling of the building. They were also informed that it would be necessary to burn kerosene oil for lighting and that it was desired to carry additional insurance. The agents thereupon undertook to carry out the wishes of Mr. Miller, thus securing the insurance which they sought. In order that he would be justified in burning kerosene for lighting, a provision must be inserted in the policy; in order that he might be permitted to carry powder and refined kerosene in stock, that provision must also be inserted in the policy. The agents knew that the alterations and changes to be made in the building were of considerable importance, and that the changes and alterations could not be made very soon. They knew

that it was the desire of the plaintiff to protect himself upon all these points, and this was talked over by the parties. He must have other insurance, because the policy in suit was not sufficient to cover the risk. He must burn kerosene for lighting, because the property was situated in a small town where electric lighting or gas could not be procured. He had to carry powder and kerosene for sale, because they were a part of his business, and he had to make some change in the terms of the policy, else his alterations and repairs could not be made. He left that to the Insurance Company, and the Insurance Company, having in view the terms of its policy, attached a rider to the policy of insurance which contained, besides the lightning clause—which is not in issue—a description of the stock, and the following:

“Permission granted to effect other insurance. To make ordinary alterations and repairs; to burn kerosene of standard quality for lights, lamps to be filled during the day time only; to keep not to exceed fifty pounds of powder, and two hundred gallons of refined kerosene, it being warranted by the assured that the oil shall be drawn by day-light, or at a distance of not less than ten feet from artificial light.” (T. R., 119.)

These riders are not attached for nothing. The lan-

guage selected is the language of the Insurance Company. There would have been no change made in the terms of the policy unless the policy was not satisfactory in its original form. In addition to this, the report made out by the agent, plaintiff's exhibit "2," contains the following:

"Have you personally inspected the risk? Yes.

How old is the building? New, three months.

Is it in good repair? Yes.

How is it heated? Stoves.

How lighted? Lamps.

What is cash value of property insured? \$15,000.00.

This covers his stock at present, as he is just moving in, we will keep adding to this from time to time.

Give entire occupancy of the building.

First story. General merchandise.

Second story. Dwelling of assured.

(T. R., 120.)

A part of this exhibit is a diagram showing the location of the risk, the distance between that and the adjoining store and other buildings; the location of the country road, etc. This exhibit is dated the 17th of November, 1910. Keeping in view these facts, we make the following contention upon the first proposition in our brief.



## I.

The Courts will assume that a rider is not attached to a contract of insurance as a nullity, but must have some purpose, and the Court will look to the purpose, and, to discover what the purpose was the Court will admit testimony showing the relations of the parties and necessity for riders to be attached to the policy, and the object that the parties had in view in using the language adopted in the rider.

The Court, in *Thompson vs. Phoenix Ins. Co. of Brooklyn*, 136 U. S. 287, says:

“When an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is the most favorable to the insured.”

To the same effect are the following cases, and each of them, either Federal or United States cases, involving questions of construction, and also the question whether or not it is necessary to put a construction upon provisions:

*First Ntl. Bk. v. Hartford Fire Ins. Co.*, 95 U. S. 673;

*Emilie Moulor v. Am. Life Ins. Co.*, 111 U. S. 335;  
*F. and C. Co. of N. Y. v. Lowenstein*, 97 Fed. 17;  
*Imperial Fire Ins. Co. v. Coos*, 151 U. S. 453;  
*Phenix Ins. Co. v. Gibbs Guano Co.*, 65 Fed. 724;  
*Orient Mut. Ins. Co. v. Sun. Mut. Ins. Co.*, 68 U. S. 456;  
*Cotten v. F. and C. Co.*, 41 Fed. 506;  
*Wallace v. German Am. Ins. Co.*, 41 Fed. 742;  
*Seymour v. Malcolm McDonald Lbr. Co.*, 58 Fed. 956;  
*Lowenstein v. Fidelity and C. Co.*, 88 Fed. 474;  
*M'Master v. N. Y. Life Ins. Co.*, 78 Fed. 33;  
*Guarantee Co. v. M. S. B. and Trust Co.*, 80 Fed. 766;  
*American Credit Ins. Co. v. Wood*, 73 Fed. 81;  
*Tebbetts v. M. C. G. Co.*, 73 Fed. 95.

As illustrative of the doctrine announced in the several cases above mentioned let us quote from *Wallace v. German American Ins. Co.*, 41 Fed. 742, as follows:

“If the language employed in the policy leaves the question in doubt, the construction placed upon it, and acted upon by the assured, is to be upheld. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in ref-

erence to the subject matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him."

Citing *Wood, Ins.* 140, 141, and cases therein cited.

Counsel for defendant contends that the evidence as to the agreement of the parties is immaterial. Counsel misunderstood our purpose in offering it. It was not an attempt to vary a writing but to explain an ambiguity.

The case of *McMaster v. N. Y. Life Ins. Co.*, 78 Fed. 33, is of importance, especially in view of the fact that it was later taken to the Supreme Court of the United States and there affirmed, as we shall hereafter note. The Court, in that case, says:

"In determining the true construction of the contract between the company and the insured, regard must be had to all of its provisions, and furthermore, if there is uncertainty and ambiguity with regard to some of the provisions of the contract, resulting from the language used in differ-



ent clauses thereof, that construction most favorable to the insured must be adopted, upon the familiar principle that, as it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company.”

And then the Court goes on to say:

“In construing the contract of the parties and their acts in connection therewith, the rule is to avoid forfeiture when it may be fairly done.” Citing 96 U. S. 234, wherein the Court says:

“Forfeitures are not favored in the law. They are often the means of great oppressions and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made.

And again, citing *Ins. Co. v. Eggleston*, 96 U. S. 572, the Court says:

“Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to

estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.”

The same case is found in 183 U. S., beginning at page 24, upon the question that the representation of an agent that the policy is drawn to conform to their agreement is admissible on the question of whether the insured was or was not bound by the inserted provision, either on the ground that he had requested it, or that he was negligent in not reading the policy, and the Court further holds on the question of forfeiture of the insurance policy which contains provisions that are inconsistent, or which are so framed as to be fairly open to construction, the view should be adopted if possible which will sustain, rather than forfeit the contract. It is noticeable that this case was decided in the same term as was the case of *London vs. Grand View Bldg.*, 183 U. S. 308, upon which defendant relies. The decision was concurred in by the same judges who took part in the other decision, and this fact is the strongest evidence that the Supreme Court of the United States is still in favor of enforcing insurance policies wherever possible.

After the decision in the 183rd, we find *Peter Hagan v. Scottish Union Ntl. Ins. Co.*, 186 U. S. 423, a case

which we contend is complete authority for our position. This was a case where a rider was attached. In page 428 of that decision the Court said:

“Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of the policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.”

Bearing in mind this paragraph, let us note that if the written portion, or rider, were omitted from the policy the same would have been void had the plaintiff employed mechanics in the building for more than fifteen days at any one time. It was the intention of the parties to change that portion of the policy, otherwise there is apparently no possible excuse for the typewritten portion. The parties knew that the building was being altered, and that it could not be done within fifteen days, and it was sought to change it. If defendant's



contention be sustained the typewritten portion would not at all change the form of the policy, and to so hold would be against the law.

The Court, in the following paragraph, quoted, adopts the language from the English case therein cited to the effect that the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk without striking out the printed words, which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in Courts of law to permit of any such conclusion. And the Court says:

“If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy and what was intended by the parties by the language.” (Quoting.)

The Court adds:

“Northern Assurance Co. v. Grandview Building Assn., 183 U. S. 303, has no bearing upon this case. There the party insured proved by parol an alleged waiver, by the general agent of the company, of one of the conditions in the policy, which

required that such waiver should only be given in writing and indorsed on the policy. It was contended that the company was estopped because of the conduct of the agent in the existing circumstances in issuing such policy and taking the premium, from setting up and claiming the benefit of the condition. This court held that the evidence was improperly received, and reversed the judgment. In this case there is no question of the receiving of parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being as stated) is inconsistent with any printed portion thereof; and if so, whether it should prevail as against such printed portion. We think the written portion as to change of interest, and as to sole ownership is inconsistent with the printed portion, and there being such inconsistency the written portion must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance."

Let us adopt the language of this Court as applied to our case. It was the intention of Miller to complete the alterations and remodeling of the building. The agent knew of that intention because he knew the condition of the property, and he attempted by the language used in the rider to carry out that intention, and if he

has failed to do so the fault is not the fault of the assured.

As was said in *Brooklyn L. I. Co.*, 95 U. S. 342:

“The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done.”

And it is said in *Conway v. City of Rochester*, 51 N. E. 394:

“It cannot be presumed that the company meant to do nothing, or to do a meaningless act, when at its chief place of business, acting through its agent having general authority, it deliberately altered its written obligation so as to make it conform to the original intentions of the parties.”

It is held in *Hartford Ins. Co. v. Unsell*, 134 U. S. 439, that any agreement or declaration or course of action on the part of the Insurance Company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity upon his part, will, and ought to, estop the company from insisting upon a forfeiture, *though it might be claimed under express letter of the contract.*



What was meant by the provision in the rider, to make ordinary alterations and repairs? The right was given, without this change, if it might be done within fifteen days. The sentence therefore is ambiguous, and the Court, in *Tebbets v. Mercantile Credit Co.*, 73 Fed. 100, holds that "the ambiguous sentence is to be given the meaning that the insurer had reason to believe the insured would attach to it, and that is such a meaning as would not operate to contradict or modify to his disadvantage."

Counsel also misunderstood our purpose in introducing testimony to show that later in the year, about Christmas or between Christmas and New Year's, a party claiming to represent the Insurance Company visited the property for the purpose of learning whether or not the goods were there sufficient in amount to show that the Insurance Company's policies were taken out in good faith, and also for the purpose of learning if the property was being properly cared for. This man then knew that the carpenters and mechanics were at work and had been, yet the company found no fault.

There can be no dispute, we think, as to what is meant by alteration.

In *Session vs. State*, 41 S. E. 259, the Court says:

“Alteration means to make a change, to modify, to vary in some degree. It means to make a thing different from what it was, to vary in some degree without making the entire change, and again, to make otherwise, to change in some respect either partially or wholly.”

In *Haines vs. State*, 15 Ohio State, 455, 458 and in other cases, the following is the definition: “To alter a thing is to change its form or nature without a destruction of the existence of the thing altered or changed, or loss of its identity.”

Again in *Urdike v. Skillman*, 27 N. J. L. 131, the Court holds that the alteration of a building consists of the addition to its height, or to the extending of its interior accommodations.

The Courts have construed the word “repairs” as follows: “Repair means to mend, add to, or make over, restoration in a sound or good state after decay, waste, injury or partial destruction.”

*Farraher v. City of Keokuk*, 82 N. W. 773.

We therefore feel justified in our contention that the printed portion of the policy, stating that “if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days, at any one time the contract terminates,” is avoided

by the rider attached giving permission to make ordinary alterations and repairs without any requirement that they should be done within fifteen days. This is assuming, though it is not the evidence in the case that fifteen days after the policies were placed upon the building the lean-to had not been constructed. As a matter of fact, it does not appear that the carpenters working upon the building in putting in shelving, counters and all that sort of thing were doing anything more than making the ordinary alterations and repairs made necessary to house the mercantile stock of the plaintiff, regardless of the work which may have been done before and even for a time after the policy was written in building the lean-to and tearing out one side of the old building, so that there would be only one entire floor. The Court is not going to read into the evidence anything in aid of the defendant, because the defendant has collected its premiums and taken its risks with knowledge of the conditions.

## II.

The plaintiff contends that after the fire the defendant accepted the premiums and this contention is not disputed. Our state law, Vol. 2, Remington & Ballinger's Code, Section 6191, is as follows:

“Any person to whom any insurance company



writing insurance upon any property in this state shall deliver a policy of insurance shall be deemed the agent of such company as to all transactions relating to such insurance had between such person and the injured named in the policy prior to and at the delivery thereof.”

This provision of the statute eliminates from discussion in this case that portion of the argument of plaintiff in error contained on pages 11, 12 and 13 of the brief. The cases to which plaintiff in error calls the attention of the Court are cases decided in states not having this provision in their statutes and are not the law of the place where this policy was written.

*Bothell v. National Casualty Co.*, 59 Wash. 209, and on page 215.

### III.

Being such agent he is entitled to collect the premium, and refusal to pay to one made the agent by law might well be set forth as a ground for canceling the policy or avoiding it in case of loss. When the plaintiff proved that fifteen or more days after the fire (T. R., 74-75) a check was given to Rogers & Rogers for the premiums upon these policies, and that check paid and the money taken by Rogers & Rogers, and if that money was not

collected by them as agent for the Insurance Company, and if that money did not reach the Insurance Company, they were there in Court able to prove what the facts were, and the Court will note in the record that counsel took time to consult with his clients upon that question, and later stated that he would have no testimony to introduce upon that point. It is, therefore, we think, not going too far to assume that this money, paid to Rogers & Rogers, who were in law the agents of the Insurance Company when the policies were written, and still continued to be the agents, as such paid the money to the Insurance Company, and the Insurance Company accepted that money and still retains it. It is not claimed that when the money was paid knowledge of the fire had not reached the Insurance Company, and it is not claimed that the money was ever tendered back, but upon the trial the attorney for the defendant attempted to right the blunder made, if any was made, by allowing judgment for the unearned premium. This is not sufficient.

The following cases hold that acceptance of a premium with knowledge of a breach of a condition of a policy is a waiver of the breach.

*Bofinger v. Tuyes*, 120 U. S. 183;

*Lewis v. Hyams*, 64 Pac. 816;

*Life Ins. Clearing Co. v. Bullock*, 91 Fed. 489;

*Globe Mutual Ins. Co. v. Wolff*, 95 U. S. 326;

*Cummings v. Pence*, 27 N. E. 630;

*Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 67.

We cite one case from the State Reports, *Mechanics' & Traders' Ins. Co. v. Smith*, 30 So. 362, wherein the Court says:

“About a week after the fire occurred, the premium on this policy, amounting to \$17 was paid to Russell & Markham, the local agents of the insurance company, and retained by the company.”

The policy claimed to be violated in that case is as follows:

“This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, shall be void \* \* \* if the interest of the insurer be other than unconditional and sole ownership, \* \* \* or if the subject of insurance be personal property and be or become encumbered by chattel mortgage.”

Suit was brought upon the policy. The defendant finally, during the trial, asked leave to file a special rejoinder of the several replications. It appeared that



the plaintiff relied upon the waiver by accepting payment and the defendant had no knowledge of this defense until the evidence was introduced, whereupon it tendered back the amount of the premium. The Court below refused to allow defendant's rejoinder to be filed. Verdict was rendered for the plaintiff and the Supreme Court held that the acceptance of the insurance premium after the fire occurred was a complete waiver of its defense (citing several cases), and that a tender of this premium back after the trial commenced is too late.

It cannot be overlooked in this case that when the work was nearly completed an agent of the company went to the premises and examined them and he then discovered, if he did not know the facts before, that the defendant in error was still working upon the building and engaged in making improvements and repairs. It was the duty of plaintiff in error then to cancel the policy, and the failure to do so is a waiver and estoppel.

*Carr v. Rogers Ins. Co.*, 60 N. H. 513;

*Bear v. Atlanta Home Ins. Co.*, 70 N. Y. S. 581.

*Chamberlain v. B. A. Ass'n. Co.*, 80 Mo. App. 589;

*Cooley on Insurance*, page 2620, 2622.

We contend, in the language of the trial Court, that

where the terms of the contract are at all doubtful or ambiguous, the Court may consider the situation of the parties, the object they had in view, and all the surrounding circumstances, without violating the rule announced in Assurance Company v. Building Association, 183 U. S. 308. The provision contained in the policy and quoted herein did not meet the requirements of the parties. The improvements were under way and the parties knew this fact and it became necessary to make some other provision to meet the existing condition. To that end a rider was attached. To hold that the changes then in progress to the knowledge of all the parties were ordinary alterations and repairs within the contemplation of these parties avoids a forfeiture and gives life to the contract, credits the parties with good faith and not fraud and is in furtherance of justice.

It appears from the evidence of Mrs. Miller and also from the testimony of the defendant in error that the defendant in error was mistaken when he made his statement immediately after the fire that gasoline and benzine was in the building, because it appears that Davis had put the gasoline and benzine in a building close at hand which was not destroyed or in any man-

ner injured by the fire, and that paragraph of the policy can have nothing to do with this case.

We respectfully submit that the decision of the lower Court should be affirmed.

Respectfully submmitted,

CANNON, FERRIS & SWAN and  
EDELSTEIN & WEINSTEIN,

*Attorneys for Defendant in Error.*



No. 2140

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IN THE  
United States Circuit  
Court of Appeals  
FOR THE  
NINTH CIRCUIT.

---

JACOB MILLER,

*Plaintiff and Defendant in Error,*

*vs.*

SPRING GARDEN INSURANCE  
COMPANY,

*Defendant and Plaintiff in Error.*

---

*Upon Appeal from the United States District Court for  
the Eastern District of Washington, Northern  
Division.*

---

**REPLY BRIEF OF PLAINTIFF IN ERROR**

---

W. W. HINDMAN,

*Attorney for Defendant and Plaintiff in Error.*

HAPPY, CULLEN, LEE & HINDMAN,

*of Counsel.*

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IN THE  
United States Circuit  
Court of Appeals  
FOR THE  
NINTH CIRCUIT.

---

JACOB MILLER,  
*Plaintiff and Defendant in Error,*  
*vs.*  
SPRING GARDEN INSURANCE  
COMPANY,  
*Defendant and Plaintiff in Error.*

---

*Upon Appeal from the United States District Court for  
the Eastern District of Washington, Northern  
Division.*

---

**REPLY BRIEF OF PLAINTIFF IN ERROR**

---

We do not question the principle laid down by the long array of authorities cited by the plaintiff to the effect that if a policy of insurance is ambiguous it will be construed most strongly against the Insurance Company, but we would like to have counsel point out to us wherein the permission to make ordinary "alterations and re-



pairs,” or the provision of the policy which prohibits “building,” or the provision which prohibits “alterations or repairing” for a period of over fifteen days, without permission, or either or any of them are uncertain or ambiguous. We have been unable to see, and counsel has failed to enlighten us.

Nor do we dispute the principle that where a written portion of a policy conflicts with a printed portion, the former controls. But if all portions of the policy can be construed together, it is the duty of the Court so to do.

As said in

Hagan v. Scottish Ins. Co., 186 U. S. 423-427:

“It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be sustained as a whole.”

And contracts of insurance must be construed in the same manner that other contracts are. The construing of the written portion of the policy permitting “ordinary alterations and repairs” with the printed portion of the policy prohibiting “building, altering or repairing” for more than fifteen days without written permission, it can be seen without argument that the printed portion was modified only to the extent of permitting ordinary alterations and repairs without limit of time, leaving the provision of “building” and extraordinary alterations and repairs unmodified.

Plaintiff cites 183 U. S. 25, to the effect that parole testimony may be received as to the conversations and agreements of agents made prior to or at the time of the issuance of the policy. This case does not so hold.

As said in the case of

Conn. Fire Ins. Co. v. Buchanan, 141 Fed. 877-893:

“McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 1046 L. Ed., is also relied upon as sustaining the admission of oral testimony of the recording agent’s knowledge of the condition of the insured building when the policies were issued and of his prior verbal assurance to the husband of the insured; and this, notwithstanding counsel make no claim that there is any inconsistency, uncertainty, or ambiguity in the provisions of the policies now in suit. That such is not the proper interpretation of the decision in that case is plain, for otherwise it would be in conflict, not only with many prior decisions which it does not mention, but also with the later decision in Northern Assurance Co. v. Grand View Building Association, which does not mention it.”

It would also be in conflict with numerous other cases decided by the Supreme Court since that time, and also, with the case of

Penman vs. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. Ed. 493:

Plaintiff, on page 13 of his Brief, cites authorities on the proposition that a practical construction placed upon an ambiguous provision of a contract, by the parties thereto, will have great weight in determining the meaning thereof. This case does not so hold. But assuming that it did, the rule applies only where the contract is ambiguous.

9 Cyc. 590.

Which is not the case here, and even if it were, then there is no evidence in the records showing that the parties ever gave it a practical construction. It shows only an application for insurance, and the issuance of a policy, without any acts on the part of either of the parties to the contract which would in the least degree tend to a practical interpretation.

And the same answer can be given to the proposition that if an Insurance Company leads the assured to believe that by conforming to a certain course of conduct forfeiture would be avoided, and if he does so the Company would be estopped from setting up his acts as a defense. And further, the policy points out a way by which local agents can waive provisions of a policy, that is by endorsement thereon, and this mode is exclusive. There is no pretention upon the part of the plaintiff that this was done, or that any officer of the Company who had power to waive the provisions, without endorsement, had any notice or knowledge that the policy was being breached. And even if Harvey was the plaintiff's agent, and not the agent of defendant Company, and had knowledge of such facts, or consented verbally to the plaintiff breaking his contract, it would not bind the defendant, unless endorsed upon the policy in the manner provided therein.

Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311;  
Kentucky Vermillion M. etc. Co. v. Norwich Union, 146 Fed. 695;

Petit v. German Ins. Co., 98 Fed. 800;

Conn. Fire Ins. Co. v. Buchanan, 141 Fed. 877;

Mulrooney v. Royal Ins. Co., 163 Fed. 833;

Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497;

Scottish Union & Nat'l. Ins. Co. v. Encampment Smelting Co., 166 Fed. 231;

Imperial Fire Ins. Co. v. County of Coos, 151 U. S. 452;

Ins. Co. v. Rosenfield, 95 Fed. 358;

Fischer v. Insurance Co., 83 Fed. 807.

The plaintiff says that there is no evidence that he violated the provision of the policy by employing carpenters



for more than fifteen days after the policy was issued. He was four or five weeks building the addition (R. p. 40), and was carrying on all the work at one and the same time.-----As said by his counsel, "In other words, he carried on all the job together," (R. pp. 43-44), and it was not completed at the time of the fire on January 2nd, 1911.

(R. pp. 87, 101).

(Counsel's Opening St. p. 35).

(Court's Finding p. 25).

And all the work was done in pursuance to a plan laid out before commencement of construction. Upon this question we call the Court's attention to the case of Robb vs. Millers' etc. Ins. Co., 79 Atl. 150 (Pa.); wherein the Court said:

"The work involved raising the roof, a new or additional foundation, and change of the basement into practically a new story with new floors. It was all done in accordance with a well-defined plan as a whole, designed as a continuous piece of work, to be carried on from commencement to completion. The work was given to different contractors. So far as time taken for the particular work of each, no one exceeded the 15-day limit. Upon this exhibit of the case, the interpretation of the provision in the policy above referred to was for the court. The learned trial judge, in his opinion sustaining the motion for judgment, held that the alterations and repairs, from their nature, plan and design, were to be considered as a piece of continuous work from the time of beginning until completion, and that prolonging it beyond 15 days was in contravention of the policy, except as the excess of time was allowed by the defendant company. In this conclusion we entirely agree. Any other view would defeat wholly the manifest purpose of the stipulation and strip it of all meaning."

Plaintiff cites Vol. 2, Remington & Ballinger's Code, Sec. 6191, in an attempt to show that Rogers & Rogers,

the agents of the plaintiff and of insurance companies other than defendant, were the agents of this defendant, and their knowledge of any facts connected with the insurance or the subject matter thereof would be notice to the defendant company. Counsel unintentionally misquoted the statute. The plaintiff says that it reads:

“Any person *to* whom any insurance company, etc.”

The provision is:

“Any person *through* whom any insurance company writes insurance, etc.”

This statute is in derogation of the right to contract, and of the common law, and is to be strictly construed.

36 Cyc. p. 1179.

Construing it strictly or liberally, however, plaintiff's proposition is not well taken. Harvey wrote the insurance or counter-signed the policy for this defendant at the request of Rogers & Rogers, plaintiff's agents, therefore he was “the person through whom the Insurance Company” wrote the insurance upon plaintiff's property. He, Harvey “delivered the policy of insurance” to Rogers & Rogers, and he was the agent of the defendant in that transaction and not the agent of the plaintiff. Rogers & Rogers were employed as brokers by the plaintiff to place the insurance, consequently they were *his* agnts.

Travellers' Ins. Co. v. Thorne, 180 Fed. 82;

Hamblet v. City Ins. Co., 36 Fed. 118-122;

P. M. F. Ins. Co. v. M. S. Imp. Co., 100 Pa. St. 137;

2nd Clement on Fire Ins., p. 532.

They acted for plaintiff and in his place, and a delivery of the policy to them was, in law, a delivery to him. So, we have in effect, a policy issued through defendant's agent, Harvey, and delivered by him to the plain-



tiff, acting by and through his agents, Rogers & Rogers. So Rogers & Rogers, being the plaintiff's agents, their knowledge was, in effect, the knowledge of plaintiff and not that of this defendant. Defendant Company did not write the insurance through Rogers & Rogers, nor did Rogers & Rogers *deliver* it to the plaintiff, within the meaning of the term of the statute, but they *accepted* it as agents of the plaintiff from the defendant's agent, Harvey. Nor is there anything to the contrary in the case of *Bothell vs. National Casualty Co.*, 59 Wash. 209, cited by plaintiff. The Court said:

"By an amendment to the answer, it was alleged that the solicitor was the agent of the insured, and that the solicitor knew that the assured was engaged when he signed the application, and intended to continue, as an actual working foreman of Chinese laborers, and did not disclose that fact to the company. The trial court found that the solicitor was the agent of the company, that the insured fully and truthfully stated to him the nature of his employment," etc., but the Court, in reversing the case, says, with reference to cases cited by the plaintiff:

"The Court ruled in both cases that the knowledge of the agent was the knowledge of the company, and that it was estopped to raise the question of an erroneous classification. To follow the rule announced in the last two cases would be to say that an insurance company is powerless to make a contract of insurance which is equitable and just to the insured, and which will at the same time protect the company against the dishonesty of its agents."

But, assuming that Rogers & Rogers were the agents of the defendant, then any notice which they received, or agreement which they made, notwithstanding the statute, could not bind the defendant unless endorsed on the policy, and parol evidence can not be received to show it.



*Mulrooney v. Royal Ins. Co.*, 157 Fed. 598, at 603;  
Affirmed on Appeal in 163 Fed. 833.

There is no evidence in the record that the defendant accepted any premium on the policy after the fire, nor that if any premium was paid to it or its agents, it had any knowledge of the breach of condition of the policy at the time of the payment, and the burden of proof, of course, rests with the plaintiff to show facts constituting estoppel or waiver. Estoppel will not arise unless the person attempted to be estopped had knowledge of all the facts at the time he did the acts complained of.

*Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326; 24 L. Ed. 387;

*Benneke v. Conn. Life Ins. Co.*, 105 U. S. 355; 26 L. Ed. 990.

Nor does the acceptance of the premium with knowledge of such facts constitute an estoppel. Plaintiff can recover a judgment for the premium, if not properly paid, and an offer by defendant to permit such judgment to be taken is all that is required.

*Georgie Home Ins. Co. v. Rosenfield*, 95 Fed. 358;  
*Ky. Vermillion M. & C. Co. v. Norwich Union F. Ins. Co.*, 146 Fed. 695.

The premium was due in this case at the time of the fire. (R. p. 117.) The policy also attached upon its delivery, and became void by reason only of the acts of the assured subsequent thereto, consequently the Company was entitled to collect the premium if it saw fit so to do.

As said in

1st Clement on Fire Ins. p. 438:

“Acceptance or retention of the premium after the fire does not necessarily waive a forfeiture where the premium was due and a part thereof earned.”

See also:

Burner's Admr. v. Ins. Co., 45 S. W. 109, Ky.;  
Smith v. Continental Ins. Co., 43 N. W. 810 (Da.);  
Pratt v. N. Y. Central Ins. Co., 55 N. Y. 505;  
Shimp v. Cedar Rapids Ins. Co., 16 N. E. 229  
(Ill.);

Northwestern Mut. Life Ins. Co. v. Amerman, 10  
N. E. 225 (Ill.)

Plaintiff makes the statement that an agent of the Company visited the premises when the building was nearly completed, and therefore defendant is estopped from maintaining its defense. Even if this statement were true it would be absolutely immaterial. But we are surprised that such eminent counsel as plaintiff's, would make such an assertion, as there is no evidence to that effect in the record, and it is not true as a matter of fact. So further comment is unnecessary.

In closing we desire to say that plaintiff has not attempted to answer our argument made in the opening brief, that what was done by the plaintiff constituted a “building” within the terms and provisions of the policy, and as that provision was violated, the policy was void; and we presume from his silence that it must be taken as an admission that our contention is correct.

Respectfully submitted,

W. W. HINDMAN,

*Attorney for Defendant and Plaintiff in Error.*

HAPPY, CULLEN, LEE & HINDMAN,

*of Counsel.*





No. 2146

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CHARLES F. ALLEN and L. ELLEN ALLEN, His  
Wife,

Appellants,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Testimony  
Printed and Filed by Appellee.

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Upon Appeal from the United States District Court for the  
Eastern District of Washington, Northern Division.

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FILED

OCT 31 1912



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CHARLES F. ALLEN and L. ELLEN ALLEN, His  
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Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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Upon Appeal from the United States District Court for the  
Eastern District of Washington, Northern Division.

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# RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Certificate of Clerk U. S. District Court to  
Testimony.]

*In the District Court of the United States, for  
the Eastern District of Washington, Northern  
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES F. ALLEN and L. ELLA ALLEN,  
His Wife,

Defendants.

United States of America,

Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that in pursuance of an order made by the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, a copy of which is hereto attached, the annexed is all of the testimony taken and filed in this cause and upon which the same was decided.

In witness whereof, I have hereunto set my hand and the seal of the District Court for the Eastern District of Washington, this 6th day of September, A. D. 1912.

[Seal]

W. H. HARE,

Clerk.

By Frank C. Nash,

Deputy Clerk.

**[Order Directing Transmission of Testimony, etc.]**

*In the District Court of the United States, for  
the Eastern District of Washington, Northern  
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES F. ALLEN and L. ELLA ALLEN,

His Wife,

Defendants.

On motion of E. C. Macdonald, Assistant United States Attorney for the Eastern District of Washington, it is hereby

ORDERED that the Clerk of this Court be, and he is hereby, directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, all of the testimony taken and filed herein.

Dated at Spokane, Washington, this 6th day of September, A. D. 1912.

[Signed] FRANK C. NASH,

Judge.

[Endorsed]: No. 1478. In the District Court of the United States for the Eastern District of Washington. United States of America, vs. Charles F. Allen and L. Ella Allen, His Wife. Order, and Certificate of Clerk of U. S. District Court.

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[Endorsed]: Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Jul. 24, 1911. Frank C. Nash, Clerk. —————, Dep.

[**Testimony.**]

*In the District Court of the United States, for  
the Eastern District of Washington, Eastern  
Division.*

No. 1478.

UNITED STATES OF AMERICA,

Complainant,

vs.

CHARLES F. ALLEN and L. ELLA ALLEN,  
His Wife,

Defendants.

The examination of witnesses in the above-entitled suit in equity was held beginning on the 28th day of January, 1911, at the hour of 10 o'clock A. M., on behalf of the complainant, before me, a Special Examiner, duly appointed and authorized to administer oaths and to take and certify said depositions, at the places mentioned therein, in a certain suit now pending and entitled, In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein the United States of America is complainant and Charles F. Allen and L. Ella Allen, his wife, are the defendants, the complainant appearing by E. C. Macdonald, Esq., Assistant United States attorney, and the defendants appearing by B. C. Mosby, Esq., their attorney.

That the following named witnesses were examined before me, each of said witnesses before being examined being first duly sworn, each for himself and cautioned, deposed and testified as herein set forth. [1\*]

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\*Page-number appearing at foot of page of original certified Record.



[**Testimony of Warren N. Jenkins, for Complainant.**]

WARREN N. JENKINS, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. You are Mr. Warren N. Jenkins?

A. I am.

Q. What is your age?      A. Twenty-four.

Q. And you reside where?

A. I reside at the present time on a homestead near Moses Lake in Grant County, about 12 miles from Ephrata. My postoffice address is Morrison.

Q. You were in the Government service, were you not?      A. I was.

Q. In what capacity and during what time?

A. I was a Special Agent in the Spokane Field Division from the early part of the year 1909, until the first of March, 1910.

Q. That is in the General Land Office, in the Interior Department?      A. In the Interior.

Q. I say that is in the General Land Office?

A. Yes, it is.

Q. I will ask you if, during the time you were in the employ of the Government as Special Agent, you made an investigation of the timber and stone entry of Charles F. Allen, covering the northwest quarter of Section 28, Township 30 North, Range 38 E.,

(Testimony of Warren N. Jenkins.)

W. M.?      A. I did. [2]

Q. At what time?

A. As I remember it, it was some time in the latter part of January or the first of February, 1910.

Q. I wish you would state, Mr. Jenkins, just what you did in the pursuance of your examination of that entry, and if you visited the property, state what you did there.

A. Under instructions of the Chief of the Field Division, Mr. Comerford, I took such papers in the case as we had, in order to make an examination and report upon the entry of Mr. Allen, and the first thing I did was to go to Springdale, and after interviewing some of the men who knew the property, I was taken to the property by Mr. Wolf.

Q. Do you recall his initials?

A. As I remember it, he gave his name as John Wolf. I don't remember his initials but I think he wrote his name out as John Wolf.

Q. Was it John F. Wolf?

A. I believe that is the name; yes. Mr. Wolf and I drove to the property, or, as near to it as we were able to. The snow was deep, and walked in from the nearest road, which, as I remember it, was a mile or maybe more than that. Coming to the camp, Mr. Wolf showed me what he said was the lines of the claim, of the timber and stone claim. About 200 feet further on we came to what he said was the mining improvements of the Hunter Creek Company—

Mr. MOSBY.—I object to this as incompetent,



(Testimony of Warren N. Jenkins.)

irrelevant and immaterial and as hearsay evidence.

A. (Continued.)—of the Hunter Creek group of mines. I [3] measured up the buildings I found thereon—would it be permissible for me to look at my report on it there?

Q. Did you make a report on that?

A. Oh, yes, I made a report on it.

Q. I hand you a copy of the report and if you recognize it as a copy of the report made by you, you may use it for the purpose of refreshing your recollection.

A. I found the following improvements located on the southeast quarter of the northwest quarter—

Mr. MOSBY.—We object to that as incompetent, irrelevant and immaterial and on the ground that the witness has not qualified himself to show that the land mentioned is the ground in controversy.

A. A log mess-house 18 by 24 feet, a log bunk-house 25 by 25 feet, another log bunk-house 18 by 20 feet, a shake work-shop 18 by 20 feet, two 12 by 14 log cabins, one 18 by 20 feet, a log work-shop, 10 by 10, a frame house, and other buildings, all in good repair. We found what appeared to be one main tunnel in back of the buildings, with a large amount of dumpings at the mouth of it, and there was a track running into the tunnel. The tunnel was timbered in for about 25 or 30 feet, to where a recent fall had covered the track so that it was dangerous for us to crawl over it, and we did not do so. However, the tunnel appeared to extend a considerable distance beyond that. We found another tunnel driven in



(Testimony of Warren N. Jenkins.)

about 90 feet, uncaved.

Mr. MOSBY.—To expedite matters I would suggest, to save time and work, you can simply have that as an exhibit if you [4] want to.

The WITNESS.—There is a very little more of it. And a shaft that appeared to be 50 feet deep. Near the mouth of the shaft it appeared to contain about a carload of ore. Several other large piles of rock and ore we found near the mouth of the two tunnels. Numerous mining tools we found through all the buildings, as well as in the mouth of the openings, and all the buildings were well furnished, showing that the camp had not been abandoned.

Q. Mr. Wolf was with you all the time that you were on this property, was he? A. Yes, sir.

Q. And he accompanied you around wherever you made this investigation of this property?

A. Yes, sir.

Q. And he saw the mining improvements that you have mentioned? A. Yes, sir.

Q. I will ask you if, during the course of the examination, and investigation of this entry, you had a conversation with Mr. Allen? A. I did.

Q. Mr. Allen is the gentleman who is sitting in the room here with us now? A. Yes, sir.

Q. Where did you have any conversation with him?

A. In our office, the office of the Field Division, in the Federal Building in Spokane. [5]

Q. About when was that?

(Testimony of Warren N. Jenkins.)

A. It was about a week after I returned from the claim.

Q. I wish you would state, if you can, the substance of your conversation with Mr. Allen.

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial, the relevancy of the testimony not having been shown.

A. Mr. Allen called at the office, in compliance with my request to interview him, and I stated to him that I wished to talk to him in regard to the circumstances which led him to run out the lines of this claim. He told me, as I remember distinctly, that he was well acquainted with that country up through there, having had mineral claims near there prior to the time he took up this timber and stone claim; that the country near this timber and stone claim did not have on it any survey stakes, and that therefore it was necessary for him to run his lines, I believe two miles, in order to get on to the claim. He said he did this with a pocket compass and a measuring rope, when the snow was on the ground. I asked him if he believed that these mineral improvements, or any of them, was on his claim, and he said he did not. I asked him what he had reference to when he mentioned "abandoned mineral claims" in his proof on his timber and stone claim, and he said he included one of the shafts which is now—which is in this group of mines, but which he thought was 50 feet east of his outside line although he was not sure whether it was on his claim or not. He further told me that later on, he believed that these



(Testimony of Warren N. Jenkins.)

improvements were on his timber and stone claim, and that [6] he had had some dickering with the mining company in regard to selling out his claim to them. I don't recall anything else he said.

Q. Did he state anything else about what terms had been offered or were offered by him for the sale of his rights to this claim to the mining company?

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial.

A. I don't remember the figure but he did tell me that he had made a proposition whereby he was to get considerable money—I have forgotten the amount—and also a share in the mining company which was to develop it and which they were to bind themselves to develop it. That, I believe, is the way it was now.

Q. Did he refer to these mining developments which are within the lines of his claim as you have described? A. He did.

Q. Did you take an affidavit from Mr. Allen at that time? A. Yes, sir.

Mr. MACDONALD.—Now, we haven't got the original here, Mr. Mosby, but I understand you have a copy of it there.

Mr. MOSBY.—Yes, sir.

Mr. MACDONALD.—Suppose we stipulate that we can read it into the record. You and I can compare it to see if my copy is the same as yours.

Mr. MOSBY.—Yes, as I want to use it on cross-examination.

Q. You took an affidavit, then, from Mr. Allen on



(Testimony of Warren N. Jenkins.)

that? A. Yes, sir. [7]

Q. You took an affidavit from Mr. Allen on or about the 8th of February, 1910? A. I did.

Mr. MACDONALD.—Will you let the record show this affidavit may be read in? I will read it and you can compare it.

Mr. MOSBY.—Yes.

Mr. MACDONALD.—That is all. I will get the original affidavit later.

Cross-examination.

(By Mr. MOSBY.)

Q. First, I want to ask you, Mr. Jenkins, are you a surveyor by education?

A. I am not, although I have studied surveying.

Q. You are not a practical surveyor?

A. I am not a practical surveyor.

Q. Are you an expert mining man by education?

A. I am not.

Q. Or by experience?

A. No, sir; but I do understand coal mining by experience.

Q. Have you any personal knowledge that the ground that you examined and where you stated these improvements were found was the land mentioned in the bill of complaint? Now, before you answer that question I am advising you that that requires, of course, a knowledge of surveying.

A. I don't know what land you have reference to.

Q. Well, the timber and stone claim mentioned here, as the northwest quarter of section 28, town-

(Testimony of Warren N. Jenkins.)

ship 30 north of range 38 east of the Willamette Meridian.

A. I never run the lines on that claim. [8]

Q. You don't know, then, Mr. Jenkins, that this property upon which you were with Mr. Wolf was the property described in the bill of complaint; you have no personal knowledge of that?

A. Not excepting what he told me.

Q. Do you know whether or not the ore or mineral, I will say, that you saw on the dump was extracted from that tunnel and the shaft, that that contained mineral in paying commercial quantities?

A. I do not.

Q. You do not?      A. No, sir.

Q. Now, did not Mr. Allen state to you at the time of this conversation that you mentioned that when he surveyed the ground mentioned in the bill of complaint, to which patent was issued to him, that he did so with a pocket compass and a measuring rope?      A. He did.

Q. He did?      A. Yes, sir.

Q. I will ask you further, Mr. Jenkins, if Mr. Allen did not also state to you in effect this: that on or about—now, I am simply making use of the affidavit to incorporate a statement therein in my question: “That on or about—” this is on page 2 of the copy of the original affidavit, on file secured by W. N. Jenkins, Special Agent, from Charles F. Allen, defendant in this case: “That on or about January 7th and 8th, 1907, I stayed overnight at the mining camp. At that time Elmer Brain and Dick



(Testimony of Warren N. Jenkins.)

Morris were on the claims and they [9] stayed at the camp. At that time I think that Brain took me through the tunnels 100 or more yards from the shaft aforesaid.” A. As I remember it, he did.

Q. Then, Mr. Jenkins, you understood from Mr. Allen that he meant by the use of the word “workings” there, the tunnels one hundred or more yards from the shaft aforesaid, that is what he meant by the workings?

A. I understand this; he had no objection to the use of the word “workings” until he returned from your office. “Workings” suited his interpretation of the facts prior to the time he returned from your office. Then he wanted it limited to tunnels.

Q. Well, prior to that time had he indicated what he meant by “workings” or had you indicated to him what you meant by “workings”?

A. I don’t think the question had been mentioned before.

Q. The question had not been mentioned?

A. I think not.

Q. Then you understood from what Mr. Allen told you on his return from my office, that he simply wanted you to define what you meant by the use of the word “workings” when you stated “at that time Mr. Brain took me through the workings”?

A. He gave me no reason for wanting it changed, excepting that you said you wanted it changed; he did not say that he had not been through there, but that you wanted it changed.

Q. To read as I indicated? A. Yes, sir.



(Testimony of Warren N. Jenkins.)

Q. Mr. Jenkins, Mr. Allen gave you to understand, did he not, [10] that he thought and believed the claims that you have mentioned were not within the boundaries of his patent, that is, he gave you to understand that he believed, at the time he was making his application for the patent, at that time between his first application and the issuance of the patent—

A. You mean his proof?

Q. Yes, his final proof, between his application and his final proof, that he believed that those claims that you mentioned were not within the boundaries of the land for which he was seeking patent?

Mr. MACDONALD.—I object to it as incompetent, irrelevant and immaterial and not cross-examination.

A. He did, with the exception of the one shaft which he said he did not know, at least he did not know whether it was on his claim or not.

Q. Now in reference to that shaft, Mr. Jenkins, didn't he give you to understand that he considered that an abandoned shaft?

A. He said he had so stated that shaft to be abandoned in his affidavit.

Q. I understand "that the above-named shaft was abandoned. It was close to the line I run and I was not positive that it was on my claim."

A. Yes, sir.

Q. Now, Mr. Jenkins, in reference to the conversation that Mr. Allen had with you, this same conversation, of course, and the part therein regarding deals on foot that he contemplated making with the peo-

(Testimony of Warren N. Jenkins.)

ple for the purchase of his claim, [11] or a portion of his timber and stone claim, did he give you to understand that he considered that the land had on it mineral in paying commercial quantities or did he not?

A. He gave me to undersand that he was not positive whether it would pay or not; he would like to see it developed; that he did not want to sell out to this mining company unless it would develop it, that he wanted to see what it would bring forth, leading me to believe that it would bear out something.

Q. Didn't he give you to understand that he had no knowledge of there being any mineral in the ground in paying or commercial quantities until after the issuance of his patent?

A. I don't know as we talked about the time prior to the issuance of patent and afterwards, that was our general conversation. His idea of the ground evidently was not changed on account of its not being developed as yet. What I mean to say is that he talked about his idea of the ground prior to the time he got his patent, that is, the Hunter Creek Mining ground.

Q. What I am trying to fix now, Mr. Jenkins, is the time to which Mr. Allen believed that there was a possibility of their being in the ground mineral in sufficient commercial quantities to pay as a mining property.

Mr. MACDONALD.—I make the same objection.

A. The only time that he had apparently expressed his idea on that was during the year 1908,



(Testimony of Warren N. Jenkins.)

when he was dealing with them.

Q. Well, what I want to find out now is, you indicated, in fact you stated positively in your testimony, that Mr. Allen spoke of his deal with these people? [12] A. Yes, sir.

Q. And his expecting to get something out of it?

A. Yes, sir.

Q. And he indicated to you that he thought there was a possibility of there being ore in the ground in commercial quantities? A. Yes, sir.

Q. Well, what I am asking now is, did he or did he not indicate to you, when he first developed that belief? A. He did not.

Q. Did you ask him?

A. Not that I remember of.

Q. You did not ask him as to when he first got the idea that possibly there was mineral in the ground in paying quantities?

A. No, only he knew that, or he believed that in 1908. Prior to that I don't know what his belief was.

Q. Well, your conversation with him was in the latter part of January or the early part of February, 1909? A. In 1910.

Q. Or 1910, yes, I mean 1910? A. Yes, sir.

Q. Did he not indicate to you, Mr. Jenkins, that he had no knowledge at all of the fact that the Hunter Creek Mining & Milling people were claiming that their claims were on his ground, until he had been notified of that fact, or notified of their claim that their claims were on his ground by Elmer Brain in



(Testimony of Warren N. Jenkins.)

the fall of 1908, or late in the summer of 1908? [13]

Mr. MACDONALD.—The same objection.

A. He so stated to me; yes, sir.

Q. How long had you been in the Government service, in the service of the Interior Department in the capacity of Special Agent, Mr. Jenkins, at the time you had this conversation with Mr. Allen?

A. I have forgotten the exact date, they took me out of the office, it was practically a year, just about a year before, it was that time of year before, in the spring of 1909, early in the spring.

Q. How much, if any, experience in such matters as this did you have while so connected with the department prior to your conversation with Mr. Allen?

A. On Field Examinations I had had that year. On Field Reports I had had two years.

Q. On Field Examinations only a year?

A. Yes, sir.

Mr. MACDONALD.—Q. Please state briefly what your duties were with reference to these field reports.

A. By that I mean I was in the General Land Office at Washington, D. C., handling reports made in the field by other agents, and acting thereon.

Q. (Cross resumed.) Now, referring to that, Mr. Jenkins, did you see anybody in or around the camp, any person or any human being?

A. There was nobody there excepting Mr. Wolf and I.

Q. You were visitors? A. Yes, sir. [14]

Q. But there was nobody residing there?

(Testimony of Warren N. Jenkins.)

A. Not at that time; not on that day.

Q. You saw no indications of any human being there?

A. No, although there was grub there and furniture there, and blankets also. I don't know how long before there had been anybody there.

Q. Do you know whether or not any of the buildings that you saw was called by the Hunter Creek Mining & Milling Company its power-house?

A. I don't know that they designated the buildings as I named them myself.

Q. Do you know whether or not any of the buildings that you saw was called its smelter?

A. I don't know what they called them.

Q. You do not?      A. No.

Q. Mr. Jenkins, I will ask you if you recognize that photograph as being a photograph of any portion of the ground that you visited?

A. Yes, sir; I think that is a view of the mouth of the main tunnel.

Q. That is a view of the mouth of the main tunnel?

A. Going towards the mouth of the main tunnel.

Mr. MOSBY.—Mark that photograph “Defendants’ Exhibit No. 1.” I am offering that in evidence, Mr. Macdonald.

(Photograph admitted and marked Defendants’ Exhibit No. 1 Admitted.)

Q. You recognize that, Mr. Jenkins (handing witness another [15] photograph) as being a part of the ground that you visited?

A. Yes, sir, that is a part of it.

(Testimony of Warren N. Jenkins.)

Q. That is a panoramic view, isn't it, Mr. Jenkins, of practically all of the camp?

A. I don't know that that contains all of it, although those buildings are in the camp ground. I remember some of them.

Q. I say practically all of them? A. Yes, sir.

Mr. MOSBY.—I offer it in evidence as the defendants' exhibit.

Mr. MACDONALD.—I assume you will follow this up later on, Mr. Mosby, with proof as to the time when these were taken?

Mr. MOSBY.—Yes, sir.

Mr. MACDONALD.—With that understanding, there will be no objection.

(Photograph admitted in evidence and marked Defendants' Exhibit No. 2 Admitted.)

Q. And that (handing witness still another photograph), Mr. Jenkins, do you recognize that as being one of the buildings that you saw on the ground that you visited? A. I cannot say that I did.

Q. You don't recognize it?

A. There are some of the buildings that look similar to that but there are no marks on that that I could positively recognize it to swear to it as one of the buildings.

Mr. MOSBY.—Just mark it for identification, now.

(Photograph last exhibited to witness is marked Defendants' [16] Exhibit No. 3 for identification.)

Mr. MOSBY.—That is all.



(Testimony of Warren N. Jenkins.)

Mr. MACDONALD.—If there is anything further within your knowledge, Mr. Jenkins, bearing upon the issues in this case, I will be glad to have you state it.

Mr. MOSBY.—Of advantage to either party, Mr. Jenkins, either to the Government or to the defendants.

A. I don't think of anything I can add.

Witness excused. [17]

**[Testimony of Jerry Cooney, for Complainant.]**

JERRY COONEY, produced as a witness on behalf of the complainant after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Cooney, will you please state your name, age, residence and occupation?

A. Jerry Cooney; age, 43; residence, Springdale, Washington; occupation, merchant.

Q. I will ask you whether or not you knew Mrs. Brain, who was connected in some capacity with the Hunter Creek Mining & Milling Company?

A. I know her.

Q. I will ask you whether or not you knew that she and her company, the Hunter Creek Mining Company, were engaged in mining operations over in section 28, township 30 north, range 38, on what is known as the Hunter Creek property?

(Testimony of Jerry Cooney.)

A. I don't know the location of the mine as to sections or quarter sections or anything of that kind.

Q. You said you knew it then as the Hunter Creek property?

A. I know the location of it as the Hunter Creek.

Q. I will ask you whether or not, during the years 1905 and '06 you sold to Mrs. Brain or to the Hunter Creek Mining & Milling Company mining supplies and other supplies for use in such mining operations?

A. Well, the supplies that they used at that time were mostly groceries. [35]

Q. Do you know whether or not any ore was shipped from that?—

A. I know of one small shipment to the Northport Smelter.

Q. Do you know where that went to?

A. To the Northport Smelter.

Q. Do you know whether or not, since 1906, there has been anybody over there on that property?

A. At times; yes.

Q. Have you, since that time, been in the habit of selling them groceries and stuff?      A. Oh, yes.

Q. Now, I will ask you whether or not, in the latter part of 1908 or the early part of 1909, you had a conversation with Mr. Charles F. Allen, the defendant in this case?      A. Yes, sir.

Q. I wish you would state what the substance of that conversation was.

Mr. MOSBY.—I object on the ground that the relevancy of this admission or whatever it is has not

(Testimony of Jerry Cooney.)

been shown. You did not state the purpose of it.

Q. (Continued.) With reference to his timber and stone claim over in section 28? A. Yes, sir.

Q. Just state what that conversation was, if you recall it.

A. You want just the conversation that Mr. Allen and I had?

Q. Yes, sir.

A. In speaking of his stone and timber claim, his property, it had been brought up that the Hunter Creek Mining & Milling [36] Company wanted to make some sort of a trade with him for it and—

Mr. MOSBY.—What is the date of that, in the early part of the winter?

Mr. MACDONALD.—In the latter part of 1908 or the early part of 1909.

Mr. MOSBY.—I withdraw my objection.

A. There had been some talk between Mrs. Brain and myself, and some correspondence, on whether Mr. Allen would sell to them or not. I told her I thought Mr. Allen would, and in speaking to Mr. Allen he said he was not sure that the land he owned overlapped their property, but if it did that he was willing to sell it to them at a reasonable price.

Mr. MACDONALD.—I think that is all.

Cross-examination.

(By Mr. MOSBY.)

Q. What was the extent of this shipment that you mentioned, this small shipment to the Northport Smelter?

A. Well, I don't know whether it was one ton or



(Testimony of Jerry Cooney.)

two tons; just a small one. It was hauled down in wagons and I don't suppose it was over a couple of tons of ore.

Q. That is the only shipment that you know of ever having been made from that property?

A. The only commercial shipment. They shipped out a sample occasionally.

Q. Now, these groceries or supplies that you spoke of selling, you would sell such supplies presumably to others than mining operators or miners, would you not?

A. Yes, sir, along towards the last of their stay up there [37] was very little, if any, work done in it, that is underground, they were building and working in that way.

Q. What I mean is, were the supplies in the way of mining implements and dynamite?

A. Oh, very little, very little. I think the old journal that was saved from the fire, I have that, I showed that to Mr. Jenkins when he was here. He remarked from that that there wasn't very much in that that would indicate they were mining.

Q. What is that journal?

A. My journal of sales.

Mr. MOSBY.—That is all.

Redirect Examination.

(By Mr. MACDONALD.)

Q. Do you know how much they received from this shipment of one or two tons of ore to the Northport Smelter? A. I know what they told me.

Q. What did they tell you?

(Testimony of Jerry Cooney.)

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial and hearsay.

A. About seventeen dollars.

Mr. MACDONALD.—That is all.

Mr. MOSBY.—Q. In reference to that shipment, Mr. Cooney, you don't know but what that shipment was a shipment of selected samples, do you?

A. I don't know a thing about it; I don't even know that it came from that mine or not, only they said it did.

Witness excused. [38]

**[Testimony of J. R. Walling, for Complainant.]**

J. R. WALLING, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Walling, will you please state your name, age, residence and occupation?

A. I will be 57 years old on the 14th day of March; I am a butcher by trade; have been prospecting and mining for 20 years until I went back to the butchering again.

Q. And your initials are J. R.?

A. J. R. Walling.

Q. And you live here in Springdale, Washington?

A. Yes, sir.

Q. How long have you lived in this section of the country?

(Testimony of J. R. Walling.)

A. Since '97, 1897; about 12 or 13 years here.

Q. Now, have you done any prospecting and mining in this surrounding country, in the Springdale Mining District? A. Yes, sir.

Q. For how long a period of time?

A. Well, I started in in 1897 and worked until 1905, when I came here to Springdale and went to the butchering, back again to the butchering.

Q. Are you acquainted with what is known as the Hunter Creek group of claims over here in Section 28?

A. I know what is the Hunter Creek group of claims, but I don't know what section they are in.

Q. You are familiar with the Hunter Creek group of claims? [39] A. Yes, sir.

Q. Do you know who those claims were located by?

A. Located by Linton and Perry.

Q. In what year, do you know?

A. No, sir; I don't know what year.

Q. Do you know Mrs. Brain? A. Yes, sir.

Q. Do you know whether she took over those claims?

A. Yes, sir, she went there and went to work.

Q. Do you know whether she did any active mining work on those claims? A. Yes, sir.

Q. Just state, if you can, the character of that work that she did.

A. Well, that work was a tunnel there; they ran a double compartment, I think, in 100 or 150 feet, and the last time I was in it, the tunnel was in about 400 feet, if I remember right. That is what they



(Testimony of J. R. Walling.)

told me on the ground.

Q. Were there any shafts sunk?

A. Yes, they were working on a shaft at the time. I don't remember how deep that was.

Q. You don't know the depth of that shaft?

A. No, sir.

Q. Now, were there any surface openings made?

A. Yes, sir, there was surface work done but there was a shaft 70 feet deep before she went there. I was down in that shaft and I saw some open cuts. I didn't know they was open cuts when I see them; I don't know whether they were starting [40] tunnels or how far they run.

Q. Mr. Walling, were there any buildings there on the property?      A. Yes, sir.

Q. Just state what they were.

A. There was a cook-house, and eating-house, and that was combined all together, I think; a bunk-house and stable, log-house, and then there was the last time I was there, they was framing and putting up some kind of a mill or concentrator, or something or other, getting the scantling work of it up, but I don't know what they done with it.

Q. Was there a blacksmith-shop there?

A. Yes, sir.

Q. Now, you may state whether there was any ore in the bins around there.

A. I didn't see ore in the bin; I see ore piled up in the yard.

Q. You saw it in the yard?      A. Yes, sir.

Q. Now, during this time that you have been

(Testimony of J. R. Walling.)

speaking of, was the work carried on there actively?

A. Well, Mrs. Brain was working there; I don't remember the years that they stopped; they worked there for 2 or 3 years steady. I never worked there myself but I was backwards and forwards there.

Q. Do you know the number of men they had at work there at any time?

A. Well, there was 8 to 10 men there, and I think at times [41] there was 20, but I ain't certain about that number. I know of 8 or 10; I am well acquainted with them working there at one time.

Q. I am going to ask you whether, from your experience as a miner and your knowledge of the showings in the tunnels and shafts and the openings on this group of claims, whether, in your opinion, there is sufficient evidence of ore there to justify a man in expending time and money in the development of that property? A. Yes, I think there was.

Q. I will ask you to state, as a mining man, what your opinion is as to the surface showing there of mineral.

A. Well, the surface showing looked good to me. It was really the only surface showing, what I considered was the best I ever saw in the country for a prospect, for a copper prospect, for copper and silver, it showed a silver ore and showed more croppings, continuous croppings, better than any place I saw in the country. It was really the cause of my staying in the country here.

Q. Have you gone over the property yourself, so

(Testimony of J. R. Walling.)

that you are personally familiar with the outcroppings?

A. I was with the outcroppings on the old original claims there, I was over them at different times looking over them.

Q. Now, in your opinion, was there a sufficient showing there to justify the spending of money and time in the development of it?     A. Yes, sir.

Q. Do you know Mr. Allen, here?

A. Yes, sir. [42]

Q. Do you know whether or not he has done any mining work in that vicinity in the last few years?

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial.

A. I know of his boys working on a claim that they called the Little—the old name was the Little Six. It used to be called the Little Six, down a mile or so from the other, a mile or a mile and a half; I don't know just exactly.

Q. How far was that from this Hunter Creek group?

A. Well, it would be a mile or a mile and a half. I should think inside of a mile and a half. It is a crooked road down there and I never traveled it straight through.

Q. Which direction was it from this Hunter Creek group?

A. I think it is northwest; that is to the best of my knowledge.

Q. Northwest?

A. Yes, sir, west or north of west.



(Testimony of J. R. Walling.)

Q. How far would that be in an air line? I mean in a direct line, not following the road at all, but going perfectly straight?

A. I think about a mile.

Q. About a mile? A. That is what I think.

Q. Do you know how long ago they did this work?

A. No, sir; I don't remember.

Q. You cannot fix the year?

A. No, sir; I cannot fix the year. I think it was in '95; there was one of them came out with his hand cut in the fall of '95, if I am not mistaken. [43]

Mr. MOSBY.—Do you mean 1895 or 1905?

A. 1905 is what I mean; 1905.

Q. Do you know whether or not there has been any active work done since 1905 on this Hunter Creek property?

A. No, sir; I do not; I don't remember the date.

Q. Do you know whether or not the assessment work has been kept up?

A. No, sir; I don't know that it was kept up. They swore that it was not kept up and then we located it.

Q. Has that property been relocated since?

A. Yes, sir; since Mrs. Brain stopped work there it was relocated.

Q. By whom, do you know?

A. By Lee Richardson and Amos Atkinson.

Cross-examination.

(By Mr. MOSBY.)

Q. When did you first come to this locality, Mr. Walling? A. In '97.

(Testimony of J. R. Walling.)

Q. In 1897?      A. Yes, sir.

Q. What time did you spend in the vicinity of the properties of the Hunter Creek Mining & Milling Company prospecting?      A. Why—

Q. How much time?

A. I was there pretty near all the time until 1900.

Q. About three years?

A. Yes, sir, right there; that is, within 2 or 3 miles of [44] it, at the Cleveland and I had claims located over south of the Cleveland, towards that country, and then I was on the south half one year and then back to the Cleveland for two years.

Q. You mean the south half of the reservation?

A. Yes, sir.

Q. Well, the Cleveland is situated some 3 or 4 miles from the properties of the Hunter Creek Mining & Milling Company, isn't it?

A. Yes, sir, three or four miles; I don't know just exactly.

Q. What, if any, shipments do you know of having been made from the properties of the Hunter Creek Mining & Milling Company to any smelter?

A. I don't know what was shipped.

Q. Did you yourself ever have assayed any ore that you got from the property of the Hunter Creek Mining & Milling Company?      A. No, sir.

Q. You have no personal knowledge, then, of the fact that any samples secured from those properties contained any ore in paying quantity?

A. The Brain men showed me some from the ore, ore assays.

(Testimony of J. R. Walling.)

Q. You, however, did not know that the ore came from the property of the Hunter Creek Mining & Milling Company?

A. No, sir, but I saw the ore before I ever saw the property; the ore was showed to me.

Q. But the ore that was assayed, you do not know that that ore that was assayed came from the property of the Hunter Creek Mining & Milling Company?

A. No, sir; only what the men told me. [45]

Q. Only what the men told you? A. Yes, sir.

Mr. MOSBY.—I move that his answer be stricken as hearsay.

Q. Now, how many men did you ever see working on the properties of the Hunter Creek Mining & Milling Company, Mr. Walling?

A. Why, I saw 8 or 10 men there working; I don't know how many exactly.

Q. What were they doing, Mr. Walling?

A. Working in the tunnel.

Q. In the tunnel?

A. Not all of them at one time; there was two shifts there.

Q. In what year was this, sir?

A. No, sir, I cannot call the year.

Q. You cannot call the year?

A. I was there different years; I was there when they was building.

Q. I will ask you, then, how long ago was it, would you say—has it been as long ago as 5 or 6 years ago?

A. Yes, sir, it was longer than that.



(Testimony of J. R. Walling.)

Q. It was longer than that?

A. Yes, sir, a longer time than that.

Q. Now, after these properties were worked by Mrs. Brain, or the Hunter Creek Mining & Milling Company, they were abandoned, were they not?

Mr. MACDONALD.—I object to it as incompetent, irrelevant and immaterial and not proper cross-examination.

A. I suppose they was; I don't know how it was decided in [46] court, some way or another; I don't know how it did come out.

Q. I don't want to confuse you. I want to get out the facts is all.

A. If I am allowed to tell the way it is supposed to be, they didn't do the assessment work and Lee Richardson and Amos Atkinson relocated the claim, but still, at the same time, young Brain swore that he did do the work and had gone out there to do the work. That is the reason I said I didn't know.

Mr. MOSBY.—I move that all that answer be stricken as incompetent.

Q. Now, how many times were you on the property when you saw men working on it?

A. A good many different times. I was there different times passing and ate my meals there, and was in the tunnel at different times when they were working there.

Q. Were you there when you saw nobody at all working there?

A. No, sir, they were working nearly all the time that I was at the place, visiting the camp, they was

(Testimony of J. R. Walling.)

men working there.

Q. But that was 5 or 6 years ago?      A. Sir?

Q. That was more than 5 or 6 years ago, you said?

A. Yes, sir.

Q. Have you been to the properties within the last 5 or 6 years, at all?      A. No, sir, I have not.

Q. You have not? [47]      A. No, sir.

Q. Of what value were the improvements on the property, Mr. Walling?

A. You mean the building improvements?

Q. Yes; I mean the tunnels and the shafts and the buildings, what would you estimate that the improvements in that way had cost?

A. I couldn't tell you. It cost several thousand dollars, I suppose to run that tunnel. They run a double compartment in, I think, something near 100 feet, a double compartment tunnel, and then narrowed it down to an average tunnel, and I think it was about 400 feet in when I was in that tunnel the last time. I don't know; I could not say what the work cost. And they had their buildings and bunk-houses and cook-house and eating-house and barn and some kind of a—they started some kind of a frame when I saw it last; they called it concentrator, a building for a concentrator.

Q. You say there was no ore in the bins when you were there?

A. I never saw an ore bin there; I saw ore piled up on the dump or up in the yard rather.

Q. How much was on the dump, sir?

A. I could not say; I don't think there was a car-



(Testimony of J. R. Walling.)

load that they called ore.

Q. That was all that you saw in the camp?

A. Why, they had the ore piled out in the yard, loose. I don't know how much of it they figured there was mineral, but some of it; I asked them if they figured it was shipping ore and they told me no. I was asking Mrs. Brain and Monaghan [48] at the same time, they were together.

Q. Now, do you know as to how many years' workings that ore on the dump represented?

A. No, sir, I do not.

Q. As far as you know it represented the workings of the camp since the claims had been staked?

Mr. MACDONALD.—I object; he stated he did not know.

A. I don't know. That ore there they told me they got it out in driving the tunnel. They hadn't done any stoping and I didn't see where they had been any stope work done.

Q. What was the value of the buildings on the property, Mr. Walling?      A. I could not say.

Q. I want the buildings now.

A. I could not say; the work on those buildings nor the labor it would take to build them. I don't really know how many there was; there was the bunk-house and the eating and cook-house, I think, together, and the barn. I kept my horse there, fed my horse in the barn, and ate there, but to give the value of the buildings I could not do it.

Q. Do you know of any ore in paying quantities, commercially valuable ore, being shipped from those



(Testimony of J. R. Walling.)

properties since 1905?

A. No, sir; I don't know of any being shipped.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused. [49]

**[Testimony of John F. Wolf, for Complainant.]**

JOHN F. WOLF, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Wolf, will you please state your name, age, residence and occupation.

A. John F. Wolf. I am stopping at Gifford at the present time. I have been up on a ranch looking after my home, but I am in the hills at present. Springdale is my postoffice at present.

Q. Springdale is your postoffice at present?

A. Yes, sir.

Q. How far is Gifford from here?

A. Near 50 miles.

Q. Did you come in from Gifford?

A. No, sir; I came in from the mine this morning.

Q. How far are the mines from here?

A. In the neighborhood of 20 miles.

Q. Now, Mr. Wolf, what experience have you had as a miner and prospector in the Springdale Mining District?

A. Well, I have done a good deal of prospecting

(Testimony of John F. Wolf.)

and trying to open up mines of my own. I have had a good deal of experience.

Q. Covering about how many years?

A. In the neighborhood of 15 years.

Q. I will ask you whether or not you are acquainted with what is known as the Hunter Creek group of claims? [50]

A. Yes, sir; the man that located that claim worked for me, by the name of Perry.

Q. Do you know in what year those claims were located?

A. It is mighty hard for me to remember those, but it has been 14 or 15 years ago.

Q. Yes. That is along about 1895?

A. Yes, sir.

Q. Now, do you know whether or not those locators worked those claims for a few years thereafter?

A. Yes, sir; they held them and worked on them.

Q. And then, do you know into whose possession or ownership they went?

A. They were sold to Monaghan or Mrs. Brain.

Q. And Mrs. Brain was connected with this Hunter Creek Mining and Milling Company?

A. Yes, sir.

Q. You mentioned this man Monaghan; who is he?

A. Their foreman.

Q. The foreman for Mrs. Brain? A. Yes, sir.

Q. Do you know if any work was done upon this property, then?

A. They commenced working there driving a shaft or a tunnel on the property.

(Testimony of John F. Wolf.)

Q. Do you know how far in that tunnel was driven?

A. Something like five or six hundred feet.

Q. Now, was there any shaft sunk?

A. There was a shaft before that sunk upon the hill.

Q. About how far in? [51]

A. At the time I was there it was in the neighborhood of fifteen or twenty feet, or maybe thirty feet. I did not go down it and I did not measure it.

Q. You may state whether or not there were any surface openings.

A. Oh, this property had upon it considerable surface openings.

Q. Were there any buildings on this property?

A. Perry had a cabin built there before these other parties, and these other parties built a cook-house and a bunk-house and a little blacksmith-shop.

Q. Now, while you were on that property, Mr. Wolf, did you see any ore there?

A. Why, there is ore surface showings on top.

Q. I am speaking of ore that had been mined.

A. There is copper-stained rock; I guess it is ore; I don't know the value of it.

Q. About how much of that did you see around there?

A. It is pretty hard to guess it. There was a bin up there. It might have been, at the time I saw it, I should judge pretty close to a carload. It might not have been that much, but judging it.

Q. Have you been in the tunnel?



(Testimony of John F. Wolf.)

A. I have been in the long tunnel to the end of it and one of the drifts.

Q. And how long was that drift?

A. I don't remember; I worked there three or four days for Monaghan at one time.

Q. You have been right up to the face of the drift and the [52] tunnel, both?

A. Yes, sir; I went in there and went through to where they cut the ledge, but they never drifted on the ledge, their quartz ledge.

Q. They cut it but did not drift on it?

A. Yes, sir.

Q. Now, during the time we have been speaking about, I will ask you whether you know if that work was being actively carried on there?

A. It was for quite a number of years.

Q. What number of men have you ever seen working there, mining?

A. I took dinner there when there was 8 or 9 men there.

Q. Working in the mine?      A. Yes, sir.

Q. I will ask you if you know whether since 1906 any active work has been done on these claims?

A. Well, they have had men there. I could not say for the active work.

Q. You say there had been men there most of the time since 1906?      A. Yes, sir.

Mr. MOSBY.—He didn't say that.

Mr. MACDONALD.—I asked him. Let him say what he did say.

Q. Do you know whether Elmer Brain has been

(Testimony of John F. Wolf.)

on that property since 1906?

A. Since 1906; yes, sir.

Q. Do you know whether any of the buildings have been kept [53] in repair since that time?

A. What year was that last panic?

Q. 1907.

A. Yes, sir; I was there. I don't know whether Elmer Brain was, but some of the outfit was there and there was a fellow by the name of—I forget his name—he was there for pretty near two years. I can't recall his name now.

Q. Mr. Wolf, do you know whether or not the assessment work has been done up there since 1906?

A. Elmer Grol was there to work there; he was there for quite a long time.

Q. Then this property has been in litigation, hasn't it, for the last few years?

A. Yes, sir; it has been in litigation.

Q. And you made some report about this property to the Government? A. Yes, sir.

Q. What was that report?

Mr. MOSBY.—I object to it, as the report shows for itself.

Q. You said you made a report about this property to the Government, didn't you?

A. Yes, sir; I reported this property to the Government, as near as I can remember, that there was so much ore, and there was so much work done on the property, and there was a showing of ore there, but that the country was badly broken up and twisted around in every direction and there was an

(Testimony of John F. Wolf.)

ore showing on the surface that was ahead of anything we had in our country at the present that I had seen; and the supposition is there may be a mine there but it is going to take money to [54] develop it, and I think there is a mine there if it is properly opened up.

Q. I will ask you this question, Mr. Wolf, whether from your experience as a miner and from your examination of the surface outcroppings and from your inspection of the tunnel and drifts there, whether, in your opinion, there is a sufficient showing to justify the expenditure of time and money in the development of that property?

A. I think there is; I think it is not prospected. There has been tunnel work done in our country but no shaft work to amount to anything. That is the trouble.

Q. You have personally examined, have you, Mr. Wolf, the surface showings on this Hunter group of claims?

A. No, I have not thoroughly, because she is naturally chopped up from one formation to another.

Q. You have to some extent?      A. Yes, sir.

Q. What is the character of the surface showings?

A. The character of it?

Q. Yes, sir.

A. It is a kind of a lime porphyry.

Mr. MOSBY.—I object to it as already gone into.

Q. You may state whether or not it is expensive to develop property of this class by reason of it being so cut up.



(Testimony of John F. Wolf.)

A. You bet it is. The tunnel work is not expensive, but the shaft work is expensive if they go down any depth.

Q. Do you know Mr. Charles F. Allen, one of the defendants in this action?

A. I know Mr. Allen. [55]

Q. Do you know whether or not he has done any mineral work on claims close to this Hunter group?

A. He told me he had a prospect over there that he done some work on.

Q. Did he tell you where that prospect was?

A. Well, I don't know as he did say that to me.

Q. Do you know where that prospect is?

A. I know where he had a cabin over there.

Q. How far would that be from these buildings and the tunnel of this Hunter group?

A. I couldn't tell you exactly.

Q. You could not estimate the distance?

A. Well, it is pretty hard to give it, to be exact.

Mr. MACDONALD.—That is all.

Cross-examination.

(By Mr. MOSBY.)

Q. About how far would it be—a couple of miles?

A. No, I shouldn't think it would be that far, but still it might be. I don't know how far it would be.

Q. Coming back to the Hunter Mining Company's properties, Mr. Wolf, you knew that country in there before there were any locations at all, did you not?

A. Oh, not until Perry made them over there. I didn't prospect them there before Perry made the locations.

(Testimony of John F. Wolf.)

Q. You knew that country?      A. Yes, sir.

Q. They were the first prospects that you had any knowledge of there?

A. Yes, sir, that Perry made there, excepting the Deer Trail. [56]

Q. That is another district?

A. Yes, sir; but they were working over there, this side of there.

Q. But there were no claims located until Perry made his locations?

A. There was this side of there?

Q. But I am not talking about this side; I am talking about simply the properties of the Hunter Creek Mining Company.      A. Please put that again.

Q. I want to know whether or not there had been any locations on the ground occupied by the properties or claims of the Hunter Creek Mining & Milling Company, before Mr. Perry located it.

A. Perry was the first locator there.

Q. He was the first one?      A. Yes, sir.

Q. And that time, I understand you to say, was about 14 or 15 years ago?

A. Somewheres near there; maybe longer. I can't remember the dates.

Q. Did you ever take any specimens of ore from the workings of the Hunter Creek Mining & Milling Company's properties and have them assayed?

A. Oh, no, sir, I never did.

Q. You haven't any knowledge then, Mr. Wolf, any personal knowledge, Mr. Wolf, that any of the ore mined from the shafts or tunnels of the Hunter



(Testimony of John F. Wolf.)

Creek Mining & Milling Company's properties had any commercial value? [57]

A. I could not say what value it had.

Q. You could not say what value it had?

A. No sir; and no man can until they are assayed.

Q. What, if any, ore do you know of having been shipped by the Hunter Creek Mining & Milling Company from their properties to smelters?

A. There was ore shipped; I don't know how much ore; I couldn't tell you.

Q. You don't know how much? A. No, sir.

Q. How many shipments were there?

A. Well, sir, I know of but one.

Q. You know of only one shipment?

A. That is all I know of.

Q. To what smelter did it go, Mr. Wolf?

A. I couldn't tell you that.

Q. You have no personal knowledge as to what the smelter returns from that shipment were?

A. No, sir.

Q. Have you been on those properties since 1905, Mr. Wolf? A. Yes, sir; yes, sir, I have.

Q. Have you been on them since 1906?

A. In 1907, wasn't it, we had the panic? That is the time I worked there and made shakes for them.

Q. In 1907? A. Yes, sir.

Q. What was the value of the work done at that time, as far as you could observe? [58]

A. Well, sir, they put up quite a building and put a mill in there for a crusher; there was buildings put



(Testimony of John F. Wolf.)

up; I don't know how much. There was 3 or 4 men working there.

Q. For what length of time, Mr. Wolf?

A. I couldn't tell you what length of time they were working there, but I saw them.

Q. For how long did you work there?

A. Very near a month, I guess.

Q. You spoke of a man by the name of Grol having done some assessment work there in 1907.

A. He was working there; he told me he was working there and I went in the tunnel and he showed me where he was working.

Q. How long was he there?

A. He was there pretty near two years.

Q. Do you know how much work he did?

A. I couldn't say.

Q. You don't know how much work he done after 1907, if any?      A. I couldn't say.

Q. He was working on the shafts and the tunnels?

A. He was working in the tunnel, so he told me.

Q. You yourself never saw him working in the tunnel or shafts?

A. No, sir; but I went in there where his tools was.

Q. Did you see anybody else working there excepting Mr. Grol?

A. Grol, he was alone at the time.

Q. He was alone?      A. Yes, sir. [59]

Q. That was the last time you were on the properties, was it?      A. Sir?

Q. That was the last time you were on the properties, that time that you saw Mr. Grol? Have you

(Testimony of John F. Wolf.)

been there since? A. Yes, sir.

Q. When you have been there since did you see anybody there? A. Yes, sir.

Q. Who?

A. I can't remember the man's name.

Q. How many persons did you see there, Mr. Wolf? A. Four or five of them.

Q. What were they doing?

A. Working and building buildings there.

Q. When was this?

A. At the time of the panic.

Q. In 1907? A. Yes, sir.

Q. You have not been on the property since then?

A. Yes, sir; I have been on it since then.

Q. Have you seen anybody working there since then?

A. I seen where they had done fresh work there.

Q. But you have never seen anybody working there? A. No, sir.

Q. Do you know for whom this Mr. Grol was doing this work, whether he was doing it for himself or for the Hunter Creek Mining & Milling Company?

[60]

A. I suppose he was doing it for the Hunter Creek Mining & Milling Company. He told me he got his pay.

Q. What is the value of the work in dollars, Mr. Wolf, done on those properties? That is the tunnels and the shafts and the surface openings.

A. That is pretty hard for a man to get at.

Q. Well, approximately, that is all I want.

(Testimony of John F. Wolf.)

A. I could not tell you how many thousands have been spent there because we spent about \$6,000 on the Rambler, and on the Butte there was over \$17,000 spent there—

Q. But, Mr. Wolf, you are a practical miner?

A. No, I am not a practical miner. I mine some, but I am a prospector.

Q. You would know what it cost to run the shaft work and the tunnel work and what such buildings as they have there would cost?

A. That would be pretty hard for me to do, to set down and figure up just what the expense of it was.

Q. You could come within a thousand dollars of it?

A. I might, and I might miss it two or three thousand dollars. It is pretty hard for a man to get at. I know we got work done up there and we done it ourselves, and we spent about six thousand dollars, and on the Butte property the man there spent seventeen thousand dollars and they didn't show as much work as we done. It would be pretty hard for a man to give you that.

Q. You said the surface indications were good?

A. The surface indications were good. [61]

Q. Which are the better, the surface indications or the indications at the end of the shafts and the tunnels?

A. Why, when they went down they lost the ore; the ore cut off or something, or broke up and faulted.

Q. It was for the reason, then, that the ore had petered out that you imagine they abandoned the property?



(Testimony of John F. Wolf.)

A. No, I do not imagine they abandoned the property.

Q. Sir?

A. I do not imagine they abandoned the property.

Q. I am talking about the property of the Hunter Creek Mining Company; their property.

A. They got involved and behind with their people in paying their debts.

Q. They hadn't any money, but it is a fact that the surface indications were a great deal better than the indications they got at the face of the tunnels or shafts?

A. I was not down in the shaft. That is something more than I can tell you. When they cross-cut the ledge there wasn't but very little showings of ore in it. They didn't drift on their ore to find the pay shoot. Those pay-shoots don't always go down. The Rambler went off this way (indicating) and we drifted—

Mr. MOSBY.—I object to that.

A. The ore shoot is different. We find our ore-shoot at the Rambler here (indicating). If we went right on down we would have missed it altogether. We drove a tunnel through, then, and then we stoped to the drift. Now, I am working on the north hillside laying to the south to catch my working.

Q. You went in the tunnel there? [62]

A. I went in the tunnel; yes, sir.

Q. You know that the ore in the tunnel is not as good as the ore on the surface?

A. It don't appear to have the same character of

(Testimony of John F. Wolf.)

the upper ore; it is all broken up and a mixed-up affair.

Mr. MOSBY.—That is all.

Redirect Examination.

(By Mr. MACDONALD.)

Q. Mr. Wolf, you have been speaking about the Rambler claim. How far is that from the Hunter Creek group?

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial.

A. About 3 miles.

Q. I will ask you if it is not a fact, Mr. Wolf, that the history of the vicinity of the Hunter Creek group of claims shows that the veins in the mineralized section are inclined to fault and be twisted up a great deal? A. Yes, sir.

Q. I will ask you whether it is not a fact that in order to properly develop a mine a great deal of tunneling and drifting and stoping has to be done?

A. Yes, sir.

Mr. MACDONALD.—That is all.

Recross-examination.

(By Mr. MOSBY.)

Q. Just one other question I want to ask you. Isn't it possible, isn't it probable, isn't it easy for a locator to find 160 acres of timber and stone land in that section of the country upon which there would be found no ore in commercially [63] paying quantities?

Mr. MACDONALD.—I object to that as incompetent, irrelevant and immaterial.

(Testimony of John F. Wolf.)

A. Why, they don't—I may answer it?

Q. Yes, sir.

A. Well, sir, there is mineral showings all through that country.

Q. Please answer that yes or no.

A. And that is a hard country to prospect in?

Q. Please answer it yes or no.

Mr. MACDONALD.—If you can answer it yes or no, answer it yes or no, and then explain it. If you cannot answer it yes or no, say so.

(Former question read to the witness.)

A. Yes, they might find 160 acres and not find it in paying quantities on the surface there. It could be done without a doubt.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused. [64]

**[Testimony of Iver Hanson, for Complainant.]**

IVER HANSON, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. What is your name, age, residence and occupation?

A. Iver Hanson is my name; I am about 50 years old; I live west of Springdale, about 10 miles; I am not doing anything much now, but I used to mine.

Q. Where did you come from to Springdale to give your testimony here?      A. I came from home.



(Testimony of Iver Hanson.)

Q. Where is that?

A. About 10 miles from here.

Q. Now, Mr. Hanson, you have had some experience in mining and prospecting, have you?

A. Yes, sir, a little.

Q. About how long?

A. About 5 years of it, or 6.

Q. Did you know Monaghan, who was foreman of the Hunter Creek Mining & Milling Company?

A. Yes, sir.

Q. Did you ever work for him?      A. Yes, sir.

Q. When?      A. In '92 and '93.

Q. You mean 1902 and 1903?

A. Yes, sir. [65]

Q. How long did you work on this Hunter Creek group of mining claims over there?

A. The first time I worked about 3 months there, I should think.

Q. And the second time, how long did you work there?

A. And the second time I didn't work very long, about a month.

Q. And what were you doing there?

A. I was mining the first time.

Q. In the tunnel?

A. In the tunnel and in the shaft.

Q. Now, at the time you were working there how long was the tunnel?

A. About 150 or 200 feet; between that; I cannot say exactly what.

Q. Now, there was a shaft there, was there, Mr.

(Testimony of Iver Hanson.)

Hanson? A. Yes, sir.

Q. How deep was that?

A. About—let's see; well, between 14 and 18 feet.

Q. Were there men working there all the time you were there? A. Yes, sir.

Q. About how many?

A. Well, about from 8 to 10 or 12 men.

Q. I see; now, was there any ore mined and piled up around the property there?

A. Yes, sir; we had some piled out up there on top of the shaft. [66]

Q. About how much would you think?

A. Well, about three or four ton.

Q. Were there any buildings on this property?

A. Yes, sir.

Q. What were they?

A. A cook-house and a bunk-house, two bunk-houses and a blacksmith-shop and a stable and some other small houses; I don't know what they use them for.

Mr. MOSBY.—Did you say a stable?

A. A stable.

Q. Now, when you were there working did the mine show any evidences of ore in the tunnel, was any ore in sight there?

A. Not where we were working in the face.

Q. Not in the face; did you see it anywhere else?

A. They said—

Mr. MOSBY.—I object to it as hearsay.

Q. Go on and answer it. Did you see any signs of copper ore down there, or any other kind of ore?

(Testimony of Iver Hanson.)

A. I seen quartz, some quartz there in about—there must have been about 100 feet from the mouth and they claimed that they—

Mr. MOSBY.—I object to it.

A. (Continued.) —that they had silver ore, galena in there.

Q. Did they drift on this vein at all? A. No.

Q. They just drove a tunnel through it?

A. Yes, sir.

Q. And they did not drift on the vein?

A. They did not do any drifting at that time.

[67]

Q. Did you see the outcroppings on the surface of this property? A. I did.

Q. You examined them, did you?

A. Not very much; just a little.

Q. I will ask you whether or not, in your opinion, there was sufficient evidence of ore there, in the outcroppings or in the shaft and tunnel, or both, to justify the expenditure of time and money to develop that property? A. Yes, sir.

Q. If you owned that property and if you had money to do so, would you feel justified on account of that showing in developing it? A. I would.

Mr. MACDONALD.—That is all.

Cross-examination.

(By Mr. MOSBY.)

Q. When did you first go on the property, Mr. Hanson? A. In 1902 and 1903, I think it was.

Q. Have you been there since?

A. Yes, I was there once since that.



(Testimony of Iver Hanson.)

Q. How long did you stay there?

A. I didn't stay there long then.

Q. Were you working there at that time?

A. No, not at that time.

Q. Simply visiting there then?      A. Yes, sir.

Q. You said you were there about 3 months on the occasions [68] of your visits there in 1902 and 1903?      A. Yes, sir.

Q. Did you work in the tunnel?      A. Yes, sir.

Q. And in the drifts?

A. Yes, sir, in the drift we were working in.

Q. Yes, sir.

A. And we worked in the shafts.

Q. You were working in the shaft?

A. Yes, sir.

Q. And was the showing in the shaft about like that in the tunnel?

A. No, it was better; we had better ore there.

Q. Where was the ore better, on top or at the bottom of the shaft?

A. Well, clear from the top down to the bottom where I worked it was just about the same.

Q. And in reference to the tunnel, was it better at the mouth of the tunnel or as you got in? How was the face of the tunnel?

A. It had no ore that I think of in the face of the tunnel at the time we was driving this cross-cut right into the ledge there.

Q. You had no ore there?

A. No, not then in the tunnel; that was the cross-cut.

(Testimony of Iver Hanson.)

Q. How far in was that?

A. Well, it was 150 or 200 feet; between that.

Q. Have you any personal knowledge as to whether or not that ore from any of the claims of the Hunter Creek Mining & [69] Milling Company is ore that carries commercial values? What I mean is, is that ore such that it would pay commercially to work it?

A. I don't know. I never had any of it tested.

Q. You never had any of it tested? A. No.

Q. How much ore was on the dumps, Mr. Hanson, at the time you were there?

A. Well, it was about 3 or 4 tons.

Q. 3 or 4 tons? A. Yes, sir.

Q. You have no knowledge whatever as to whether or not any of that ore had any commercial value?

A. No, I have not.

Q. You think it had no commercial value?

A. Oh, yes.

Q. It hadn't any commercial value, it would not pay to take that ore out and put it on the train and ship it to Northport to the smelter?

A. I couldn't tell about that.

Q. Have you any knowledge of whether a shipment of ore had ever been made from those properties?

A. Well, it looks good enough to me to ship.

Q. No; I want to know whether or not you have any knowledge, do you know of any ore being taken from there and brought here or elsewhere and shipped to a smelter? A. No, I don't know.

(Testimony of Iver Hanson.)

Q. You don't know about that?

A. No, I don't know anything about that. [70]

Q. You don't know, then, of any shipment of ore ever having been made from those properties?

A. No, I do not.

Q. How many men were working there when you were there, Mr. Hanson?

A. Well, from 10 to 12, and so on.

Q. How many men were working there when you visited there last? A. Well I cannot say.

Q. Were there any? A. Yes, sir.

Q. When was this? Please fix the time again when you were there last on a visit.

A. Well, I don't remember that.

Q. Can't you come within a year of it?

A. No, I cannot either.

Q. It must have been a couple or three years after?

A. I don't know; I cannot remember that.

Q. Have you any knowledge as to whether or not this property at any time had been abandoned by the locators or the persons in possession of it?

A. What?

Q. Do you understand the question?

A. No—well, they done the assessment, I guess, all the time.

Q. You don't know anything about that, though?

A. No.

Mr. MOSBY.—I move to strike out that first answer. [71]

Q. How much time did you put in in that country outside of the time you worked for the Hunter Creek



(Testimony of Iver Hanson.)

Mining & Milling Company, in 1902 and 1903?

A. Well, I put in about 5 or 6 years. I was all through the mountains there.

Q. There is a great deal of timber in that country, isn't there, Mr. Hanson?

A. Not a very great deal.

Q. There is considerable, though? A. Oh, yes.

Q. It would be very easy, Mr. Hanson, wouldn't it, for you, or anyone else who is qualified to do so, to locate 160 acres of timber and stone land there, without finding on that land any ore that was commercially valuable?

Mr. MACDONALD.—I object to it as incompetent, irrelevant and immaterial.

A. Well, some places around there I would take it for stone and timber, and some places I would not, but I don't know anything about that right across there. A man would have to look it up before he done anything like that.

Redirect Examination.

(By Mr. MACDONALD.)

Q. Mr. Hanson, there were evidences of ore and quartz in the cross-cut and drift in there, were there not?

A. Well, not in that cross-cut where we worked then, there wasn't any ore excepting that quartz streak. They claimed that that was ore in that.

Q. There was quartz there, though?

A. Yes, sir, it was quartz, and they said that carried silver. [72]

Mr. MACDONALD.—That is all.

(Testimony of Iver Hanson.)

Recross-examination.

(By Mr. MOSBY.)

Q. Mr. Hanson, do you know what the value of the ore was that was found in or shown in the tunnels or the shafts, on the inside of the tunnels and shafts?

A. No, I never knew.

Q. You do not know? A. Not the value of it.

Q. Yes, the value. A. No.

Q. It may have had no commercial value, then, as far as you know?

A. I don't know anything about that.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused. [73]

[**Testimony of Amos H. Atkinson, for Complainant.**]

AMOS H. ATKINSON, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Atkinson, please state your name, age, residence and occupation.

A. My name is Amos H. Atkinson; I reside here at Springdale; I am a barber by trade.

Q. And how old are you? A. I am 43.

Q. I will ask you if you knew Mrs. Brain?

A. Well, yes, sir.

Q. Were you ever employed by her?

A. Well, I was through her agent; not by her.

(Testimony of Amos H. Atkinson.)

Q. Well, for what purpose?

A. For watching the claims.

Q. That is the claims of the Hunter Creek Mining & Milling Company?      A. Yes, sir.

Q. How long were you over there, Mr. Atkinson?

A. Well, I went there some time in November.

Q. Of what year?

A. Well, now, let me see; that was the same year I came up here. I have been out here going on 6 years this spring.

Q. That would be in 1905, wouldn't it?

A. Yes, sir, and I stayed there until right close to July. [74]

Q. Of the next year, 1906?      A. Yes, sir.

Q. Now, at that time what buildings were there on the property?

A. Well, there was the bunk-house and a cook-house and a bunk-house and a power-house, I guess, and Mr. Monaghan's place—that is, his office.

Q. Was there any other small buildings on there?

A. And the blacksmith-shop. I guess that is about all there was.

Q. Were there any tunnels on these claims?

A. Yes, sir, there was one tunnel.

Q. Have you been in that?      A. Yes, sir.

Q. About how far in was it?

A. Well, now, I have forgotten just how far it was.

Q. You may state whether or not these buildings at the time you were there, were in good repair.

A. Yes, sir, they seemed to be.



(Testimony of Amos H. Atkinson.)

Q. Do you know the names of these claims that were in there, known as the Hunter Creek group?

A. Well, I know there is—a part of them, the rest of them I have forgotten.

Q. Well, state the name of those that you remember.

A. Well, there was the Red Boy—wasn't that one of them? Let me see, I have forgotten the names now.

Q. Do you recognize the following as some of the claims: The Bessie, the Louise, the Clara, the Wild Horse and the Sure Shot, and the Red Cross and Blue Cross? [75]

A. I remember the Sure Shot and the Red Cross and Blue Cross but the rest I have forgotten.

Q. Subsequent to 1906 I believe you relocated some of those claims, did you not, Mr. Atkinson?

A. Yes, sir.

Q. Who was with you on that relocation?

A. A man by the name of Lee Richardson, who was in Spokane.

Q. Did you do any assessment work on those claims? A. No.

Q. What became of them?

A. Well, we sold out to another firm.

Q. Now, in your opinion, was there a sufficient showing there of ore in the tunnels and the shafts and the surface out-croppings to justify you in doing the assessment work if you had not sold the claims?

Mr. MOSBY.—I object to it as incompetent; he has not qualified himself to testify on that.

(Testimony of Amos H. Atkinson.)

A. Well, at the time we thought there was, that is the man that was with me. I am not well posted on minerals myself—

Mr. MOSBY.—I move to strike that answer.

Q. Finish your answer if you had not completed it.

A. That is all I have to say.

Mr. MACDONALD.—That is all.

Cross-examination.

(By Mr. MOSBY.)

Q. What were you doing, Mr. Atkinson, what was your business, before you were employed by the Hunter Creek Mining & Milling Company? [76]

A. Well, I was laboring here.

Q. Laboring? A. Yes, sir.

Q. Your present occupation is that of a barber?

A. Well, it was not at that time.

Q. I say at this time, now?

A. Yes, sir. I have been here barbering for about 4 years, I guess; that is, here.

Q. You do not pretend to call yourself a miner or a mining man, then, Mr. Atkinson, at all?

A. No, sir; no, sir.

Q. You have no such knowledge of minerals or from your work in the mines to entitle you to that appellation, have you? A. No, sir.

Q. When did you first know the properties of the Hunter Creek Mining & Milling Company, Mr. Atkinson? A. When did I first go on them?

Q. Yes, sir. A. It was 1905, I guess.

Q. 1905, what month?

A. It was in November; I couldn't say as to the

(Testimony of Amos H. Atkinson.)

day of the month.

Q. How long did you stay there at that time?

A. I stayed there until near July.

Q. Of 1906? A. Yes, sir.

Q. When, if at all, were you there afterwards?

A. How is that? [77]

Q. When were you on the property afterwards, if you have been on it afterwards—that is, since?

A. Oh, well, it was the next year, I think.

Q. In 1907?

A. Yes, I have just forgotten the dates though, myself, now, but I have them out at home.

Q. Did I understand you to say that Mrs. Brain, or the Hunter Creek Mining & Milling Company, employed you as the caretaker there? A. Yes, sir.

Q. That is from the fall of 1905 until July, 1906?

A. Yes, sir.

Q. You did no work on the property then?

A. No, no; I just stayed there to look after it, was all. Mr. Monaghan was there and he got me to go and take the place and I was employed by him, through Mrs. Brain, of course.

Q. He was the superintendent or something of that kind in that company? A. Yes, sir.

Q. Have you any personal knowledge as to whether the ore extracted from these shafts and tunnels there—there was but one tunnel?

A. There is one tunnel.

Q. And how many shafts?

A. I guess there are two tunnels there. There is a shaft on top of the hill—I guess there is one or



(Testimony of Amos H. Atkinson.)

two, I forget which.

Q. (Continued.)—from the shafts and tunnels, the ore taken had not, so far as you know, any commercial value; that is, [78] it did not, so far as you know, pay to work it?

A. Well, as far as I knew, no.

Q. What is the value of the improvements in the way of building put on the property, Mr. Atkinson, if you know?

A. I have no idea as to that, what the value would be.

Q. Who was on the property in the fall of 1905 to July, 1906, at the time you were there, besides yourself and Mr. Monaghan? Anyone else?

A. 1905, you say?

Q. Well, from the time you went there in the fall of 1905 to the time you went away in July, 1906?

A. There was nobody there but myself.

Q. There was nobody there but yourself—Mr. Monaghan was not there?

A. He had been there a time or two—once, I guess.

Q. And you did no work of any kind on the property? A. No.

Q. Now, you did not, when you went away from the property in July, 1906, you did not return there until the fall of 1907, did you?

A. Now, I have just forgotten the date. I could not say just when it was we returned and done some location work.

Q. Who was that work done for?

A. For ourselves.

(Testimony of Amos H. Atkinson.)

Q. For you and who else?

A. Me and Mr. Richardson.

Q. You and Richardson? A. Yes, sir.

Q. You were relocating, then, this property? [79]

A. Yes, sir.

Q. Why were you relocating it?

Mr. MACDONALD.—I object to it as immaterial.

A. Well, they hadn't, they hadn't paid me or Mr. Richardson, that is, me for my work, and Mr. Richardson as they proposed, I guess; something like that.

Q. This work you were doing was location work?

A. Yes, sir, location work.

Q. You were making this relocation, Mr. Atkinson, on the ground that the Hunter Creek Mining & Milling Company had abandoned whatever possessory rights it may have had in the premises?

A. Well, they hadn't, I guess they hadn't abandoned it.

Q. But you were acting on that theory, were you not, Mr. Atkinson?

A. Yes, sir. They hadn't done their assessment, I guess. That was the reason.

Q. For what length of time, prior to the time that you relocated these claims, had they not done their assessment work, Mr. Atkinson, if you know?

A. Well, they hadn't done it while I was there. Before that I don't know anything about it.

Q. They hadn't done it for the year 1906?

A. No.

Q. You are positive of that fact?

(Testimony of Amos H. Atkinson.)

A. Not that I know of; I couldn't say as to that. I know they had one fellow up there to do this work, a fellow by the name of Morris.

Q. When was this? [80]

A. I guess that was in 1906. I think it was; anyway, they claimed that he hadn't done it.

Q. That he hadn't done it?

A. That his work did not prove to be in the right location and in the right place to develop the claim.

Q. All right; when you were there in the fall of 1907, did you find anybody on the property?

A. No.

Q. Nobody at all?

A. Well, after that no, I guess not; there was no one there.

Q. There wasn't anybody there?

A. No, there was no one there. I remember Mr. Brain and Mr. John Burton came up while we were restaking it, or staking the claims.

Q. How long were you there staking the claim?

A. We were there a couple of days, I guess; I and Mr. Maurice Smith of Spokane.

Q. Maurice Smith, the attorney? A. Yes, sir.

Q. Do you know a man by the name of Grol up in that locality at about that time living around there?

A. No, I do not; no.

Q. You not only did not see any such a man nor any other person on the premises at that time?

A. No.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused. [81]



[**Testimony of Ole Botman, for Complainant.**]

OLE BOTMAN, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Botman. state your name.

A. Ole Botman.

Q. What is your age?      A. I am 34 years old.

Q. What is your residence?

A. Springdale; Postoffice Box 51.

Q. And your buisness?      A. Miner.

Q. How long have you been engaged in mining and prospecting, Mr. Botman?

A. Oh, about 8 years off and on.

Q. In this mining district?

A. Well, I have been up in Coeur d'Alene a little bit, too.

Q. And here in the Springdale Mining District?

A. Well, in the Springdale I have been about 7 years in the Springdale District.

Q. Did you ever work for the Hunter Creek Mining & Milling Company and Mrs. Brain?

A. Yes, sir, I did.

Q. In what years?      A. In 1902 and '03.

Q. In 1902 and '03?

A. Yes, sir, the latter part of 1902 and the first part of 1903. [82]

Q. How long did you work there then?

(Testimony of Ole Botman.)

A. I don't remember exactly, but four months, I think.

Q. Were you working, mining, or what?

A. The last, the last part that I stayed there I worked in the mine a little bit.

Q. Did you work there any in 1904 or 1905?

A. I worked there in 1905.

Q. Now, at the time you were working up there, how many men were working on that property?

A. Do you mean the last time or the first time?

Q. No, the first time.

A. Well, there really was about 8 or 9, more or less.

Q. And the last time you were working up there there were how many men there?

A. There was 4 and part of the time 5.

Q. Now, were there any buildings on that property, up there on those claims?

A. Yes, sir; there was a boarding-house and the blacksmith-shops and a shake bunk-house, and a good many buildings they put up there out close to the blacksmith-shop.

Q. Did they have any tunnels on the property?

A. Yes, sir; they had a big tunnel going in from the blacksmith-shop.

Q. How far in was that tunnel?

A. Then, it was about four or five hundred feet.

Q. You were working in that tunnel?

A. Yes, sir, in the cross-cut and the main tunnel.

Q. How long was the cross-cut? [83]

A. Oh, about 90 feet, I guess.

(Testimony of Ole Botman.)

Q. Had there been any ore mined out of there and piled up on any part of the claims around there?

A. Yes, they piled up some on the south tunnel there about the old cabin.

Q. About how much?

A. Well, I can't tell exactly how much there was.

Q. Now, when you got back there in 1905, had the tunnel been driven in further than it was when you left there in 1903, had it been driven in any further?

A. In the main tunnel?

Q. Yes, sir.

A. Well, I couldn't exactly tell. I don't know how far the tunnel was in when I left.

Q. You don't know whether they had been working there between the time you had been working there? A. No, I couldn't tell.

Q. Was there a shaft on the property there?

A. Yes, there was one up on the hill there.

Q. About how deep was that?

A. Well, I should judge about 50 feet.

Q. Now, did you see any surface outcroppings on those claims?

A. Yes, I saw it up on the hill here.

Q. Now, in your opinion as a miner, was there a sufficient showing in these outcroppings or in the tunnels or in the cross-cuts to justify the expenditure of time and money in the developing of this property? [84]

A. Well, there was a pretty good showing of ore there.

Q. (Last question read.)



(Testimony of Ole Botman.)

A. There was a pretty good showing.

Q. Do you think a man would be justified in spending time and money there to develop that property?

A. I believe a man can find something there.

Q. You think if there was enough development done there, that they would find a mine, don't you?

A. Yes, sir.

Cross-examination.

(By Mr. MOSBY.)

Q. You believe that there is a possibility of finding a mine there, but you don't think there is a probability of it, do you? Do you understand the distinction I am making?

A. No, I don't understand you.

Q. You know what the meaning of the English word "possibility" is—do you understand the word "possibility"? A. Yes, sir.

Q. Well, you meant by your answer to Mr. Macdonald's last question, that it was possible to find a mine? A. Yes, sir.

Q. But you don't think it likely that a person would find a mine, from what you know of those claims up there, do you?

A. Well, I believe a man can find a mine; that is the way it looks to me.

Q. Well, do you know what the surface showings there indicated in reference to values, that is, what values, what ore values had those surface indications?

A. The values, no, I could not tell you anything about that. [85]

(Testimony of Ole Botman.)

Q. Do you know what the values of the ore in the shaft and tunnels were? A. No, sir.

Q. You don't know that? A. No, sir.

Q. You don't know, then, Mr. Botman, that either the ore on the surface or that in the tunnel or shaft had any commercial value, that is, that it would pay to work it, you don't know that?

A. No, I don't know that.

Q. You don't know that? A. No.

Q. Did you ever take any ore from any of the claims of the Hunter Creek Mining & Milling Company and have it assayed? A. No, I never did.

Q. What, if any, work did you say you had done in the shaft?

A. No, I did not work in the shaft.

Q. You did not work in the shaft? A. No, sir.

Q. It was simply in the tunnel? A. Yes, sir.

Q. How long did you work in the tunnel?

A. In the cross-cut?

Q. Yes.

A. Oh, I guess it was a little bit more than a month, I guess; I don't exactly know how many days it was.

Q. That was in 1903?

A. In 1905—no, 1903 was in the tunnel.

Q. What, if any, work did you do there in 1905?

[86]

A. I done the blacksmithing and put the timber in.

Q. You are a practical mining man, Mr. Botman? What would you say was the cost of the work, the improvements made on the claims? Now, by

(Testimony of Ole Botman.)

the improvements I mean not only the tunnels and shafts, but the buildings put up on the ground; what was the value of those improvements in money?

A. Well, I could not tell you.

Q. How many men were working there in 1903, Mr. Botman?      A. In 1903?

Q. How many men?

A. Well, there was eight men, more or less.

Q. What is it?

A. About 8 men, more or less. Sometimes there was more and sometimes there was less.

Q. In 1905 how many men were working there?

A. There was 4 men and part of the time there was 5.

Q. Have you been on the property since 1905, Mr. Botman?      A. No.

Q. Have you any personal knowledge as to any shipments of ore having been made from the properties to any smelter or concentrator?

A. I don't know of any.

Q. Or anywhere for treatment?

A. No, I don't know that.

Q. Are you familiar with that section of country, Mr. Botman, in regard not only to mineral, but in regard to timber?

A. No, I have never been over, very much over that country. [87]

Q. You have not?      A. No.

Q. This material that was on the dump there, sir, how much of it was there?      A. On the dump?

Q. On the dump.



(Testimony of Ole Botman.)

A. Now, I couldn't tell you exactly how much there was.

Q. Couldn't you come somewhere near it in tons?

A. No, I can hardly do that. They just piled it out there, you see.

Q. Would you say there was a carload?

A. Well, I couldn't tell.

Q. You can't tell? A. No, sir.

Q. You don't know whether this stuff on the dump was of any commercial value at all, whether it would pay to treat it? A. No, I don't know.

Redirect Examination.

(By Mr. MACDONALD.)

Q. Mr. Botman, if you had located these claims, with your present knowledge of the showing there, would you consider them worth doing the assessment work on from time to time? A. Yes, sir.

Mr. MACDONALD.—That is all.

Mr. MOSBY.—That is all.

Witness excused. [88]

**[Testimony of Willard Taylor, for Complainant.]**

WILLARD TAYLOR, produced as a witness on behalf of the complainant, after being first duly sworn and cautioned to tell the truth, the whole and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Please state your name.

A. Willard Taylor.

Q. And your age? A. 47 years old.

(Testimony of Willard Taylor.)

Q. Your residence?

A. Springdale, Washington.

Q. Your present occupation?

A. My present occupation, I am City Marshal of Springdale.

Q. Mr. Taylor, you have had some experience in mining, have you, and prospecting?

A. Yes, sir.

Q. Covering about how many years?

A. Well, I have been at it off and on for the last 30 years.

Q. You have had some of that experience in the Springdale Mining District, have you?

A. Yes, sir.

Q. Are the Cedar Canyon properties in this mining district?     A. Yes, sir.

Q. Over at Deer Trail?

A. At Deer Trail, yes, sir.

Q. Are you at all familiar with the group of claims in this district known as the Hunter Creek group?

[89]

A. Of the Hunter Creek Milling & Mining Co.?

Q. Yes, sir.     A. Yes, sir.

Q. Did you ever work on those claims?

A. Yes, sir.

Q. When was that?

A. In the fall of '91 and the spring of '92, during the winter and spring of ninety-one and ninety-two.

Q. Do you mean 1901 and 1902?

A. Yes, sir, 1901 and 1902.

Q. By whom were you employed, Mr. Taylor?

(Testimony of Willard Taylor.)

A. By Mr. Monaghan.

Q. He was the superintendent there?

A. He was the superintendent there, yes, sir.

Q. And what work did you perform?

A. I worked as a miner and a tool sharpener.

Q. Did you work in the tunnel? A. Yes, sir.

Q. How far in was that tunnel driven at that time?

A. When I quit that tunnel and quit working there it was—well, to the best of my recollection, somewheres about 220 feet.

Q. Had they struck the vein in the tunnel?

A. They had cross-cut what they thought was the vein.

Q. Did they drift any on the vein?

A. No, sir, they had not at that time.

Q. They had not at that time, drifted on the vein?

A. No, sir.

Q. Now, had they a shaft there, Mr. Taylor?

A. Yes, sir. [90]

Q. How deep was that shaft?

A. At the time I worked there it was about 18 feet.

Q. Had they taken out any ore from the tunnel there and left it on the outside?

A. Yes, sir; somewheres about a carload in a bin on the top of the shaft.

Q. Did you make any investigation of the surface outcroppings on this property there?

A. Well, just what I noticed where I was working was all.

Q. Now, you have had some experience in other portions of the Springdale Mining District, I think



(Testimony of Willard Taylor.)

you told me a few minutes ago, particularly over on the Cedar Canyon, on the Deer Trail property?

A. Yes, sir.

Q. I wish you would state in a general sort of way what the character of the veins are in both these districts, as to being broken up and lacking continuity.

A. Well, sir, I worked in what they call the Queen on Cedar Canyon, and I worked in the White Elephant and the Deer Trail, and all of that country, in the mining country that I worked in is not in place; the formation is badly shaken up. In the White Elephant where I worked there we would follow what we called a blanket ledge or ore lode in a blanket form. We followed it some; sometimes we would follow it for 60 or 70 feet and run right up against the wall, just like coming up against there (indicating on wall), and there was no sign of a wall, and we would raise and perhaps not find it, and then go down and find it below and sometimes we would go up above and strike it. [91]

Q. And the same condition prevailed in the Hunter Creek Mining group?

A. Yes, sir; they were badly shaken up.

Q. I will ask you if it is not a fact that properly to explore this Hunter Creek group, it is necessary to do considerable cross-cutting and up-raising and drifting?

A. Well, sir, in my judgment, to the best of my judgment, a man will have to go pretty deep to find the ore there in place. You will have to follow the lead until you come to where it is.

(Testimony of Willard Taylor.)

Q. Isn't it a fact that the nearer you are to the surface the greater the faulting of the vein is?

A. Yes, sir.

Q. And in your opinion, as I understand you, it would be necessary, in order to get the vein in place, without faulting, to go deep?

A. To go deep; yes, sir.

Q. From your experience as a mining man, and from your knowledge of the Hunter Creek group of claims there and the showing on the surface and the development work done in the tunnel and in the cross-cut, I will ask you whether or not, in your opinion, there is a sufficient showing to justify a man in the expenditure of time and money in developing that property?

A. Well, sir, there is lots of money spent on worse looking prospects than that—

Mr. MOSBY.—I object to it.

Q. And in your opinion it would justify it? [92]

Mr. MOSBY.—I object to it as leading.

A. Yes, sir.

Q. What is your opinion about that Hunter Creek Mining & Milling Company's property?

A. Well, sir, my opinion is that the surface showing would justify money being spent for its development.

Cross-examination.

(By Mr. MOSBY.)

Q. Have you been up on the properties of the Hunter Creek Mining & Milling Company, Mr. Taylor, since 1902? A. Yes, sir.

(Testimony of Willard Taylor.)

Q. When?

A. I have been hunting over the ground there three different times, but to give you the dates I could not do it.

Q. But you have never been up there in the capacity of a miner or laboring man?

A. No, sir, not since 1901 and 1902.

Q. Have you any personal knowledge, Mr. Taylor, as to whether or not any of the ore ever taken from the Hunter Creek Mining & Milling Company's properties have mineral value, that would pay to smelt or treat?     A. No, sir, I have not.

Q. You have not?     A. No, sir.

Q. You have known this property, then, to have been a so-called claim for a period of nine or ten years?

A. Yes, sir; I have known it for 12 years.

Q. For 12 years?

A. Yes, sir; Mr. Homer Lincoln used to own it.

[93]

Q. But during all that time you don't know of any ore being shipped from there?

A. Nothing only what had been said.

Q. You have no personal knowledge on it?

A. No personal knowledge; no, sir.

Q. What, Mr. Taylor, would you say has been the value of the improvements on the property in the way of shafts and tunnels and buildings?

A. How much money has been expended there?

Q. Yes, sir, what would you say the improvements would represent in the way of expenditures?



(Testimony of Willard Taylor.)

A. Well, sir, that is a hard question to answer.

Q. Well, approximately only, I want it.

A. Well, I would say that there has been over—as much as \$25,000 spent there in development work.

Q. When you were upon the properties last, did you make any inspection of the workings, either the tunnel or shaft?      A. No, sir.

Q. What would you say, Mr. Taylor, those properties to-day, under all the circumstances, having been worked as they have been for a period of about 13 years and being in the condition that they are in, are worth to-day as mining property; what would you be willing to pay for them yourself?

A. Well, I tell you, I don't invest any money in mining properties and as far as me myself I would not want to invest any money in it.

Q. Any money in it?

A. No, sir, to make any investment in it, because I would [94] not have any money to do that with.

Q. Assuming you had, of course; the question assumes that.

Mr. MACDONALD.—I object to it as immaterial.

Q. Just assuming, Mr. Taylor, that you were a mining man and had money to invest in mining properties, you would not put any money in that property up there, would you?

A. If I was a mining man I couldn't tell you, without I had money to—that would be a hard question to answer.

Q. But with your present knowledge of the conditions up there, and these facts in connection with it.

(Testimony of Willard Taylor.)

A. With my present knowledge of the condition of the mine, my judgment would be that there is a mine there, but my judgment would be that it will take quite a bit of money to develop it. From all the indications and the surface showings and the showing in the tunnel, if I was a mining man and had money to spend that way, I would be perfectly willing to invest some money there.

Q. How much?

A. Well, that would depend on the showing I got if I went on, how much money I would spend.

Q. Isn't it a fact that the properties up there show less values as you get lower down and that the surface values are greater than the showing in the lower workings?

A. Some of them. Now, I have a claim in the mountains and the surface showing—mine is a different kind of ore—

Q. (Interrupting.) I am not speaking about yours.

Mr. MACDONALD.—Finish your answer.

A. (Continued.) You asked me if it was not a fact that the claims in there show greater values on the surface showings [95] than in the shafts.

Q. I am referring to the Hunter Creek Mining & Milling Company's properties and not other properties.

A. I don't know nothing about the surface values of it nor the values underneath there. I never had any assays and I couldn't tell you.

Q. You are familiar with that neighborhood up



(Testimony of Willard Taylor.)

there, aren't you, Mr. Taylor?      A. Yes, sir.

Q. There is a good deal of timber and stone up there, isn't there?

A. There is quite a bit of stone.

Q. And considerable timber, isn't there?

A. Well, in some localities.

Q. Any person, a citizen desiring to locate a timber and stone claim, could very easily find a timber and stone claim up there that would not have any surface indications of ore in commercially paying quantities, couldn't he?

Mr. MACDONALD.—I object as incompetent, irrelevant and immaterial.

A. Surface showing?

Q. Yes, sir.

A. No, sir; I don't think that a man up in that present neighborhood could find 160 acres but what you could find values on the surface showing.

Q. That might be; you could find that in the streets of Springdale, but what I am speaking of is he could not find surface indications there that would justify him in locating the claim there? [96]

A. No, sir, I don't think he would. I don't think that on some 160 that a man would find surface showing enough to justify him in locating a mining claim.

Q. Were you there on these properties during the years 1906 and 1907?

A. I don't think that I was. I have been up there so many times hunting, I have hunted over that country in the fall. I go there every fall, go up there hunting deer, and I have been over the claim so many



(Testimony of Willard Taylor.)

times I couldn't tell you when I have, what years that I have been there.

Q. Have you any knowledge at all as to the abandoning of any possessory rights that the Hunter Creek Mining & Milling Company may have had to those properties during the years 1906 and 1907?

A. No, sir.

Q. You have not? A. No, sir.

Q. Have you any personal knowledge as to the relocation of any of those claims of the Hunter Creek Mining & Milling Company by a certain Mr. Atkinson and a certain Mr. Richardson?

A. Nothing, only they just told me they relocated them. I just have their word for it. I never saw their notices or anything like that.

Mr. MOSBY.—That is all.

Redirect Examination.

(By Mr. MACDONALD.)

Q. Mr. Taylor, do you know how far the Deer Trail Mining Company's properties in Cedar Canyon is from the Hunter Creek Mining & Milling Company's property? [97]

A. Not exactly, no, sir.

Q. Well, about how far is it?

A. From the Cedar Canyon Mining property to this?

Q. Yes, sir.

A. Well, on a straight line, I would judge that it was somewheres between 5 and 6 miles.

Q. It is on the same range of mountains?

(Testimony of Willard Taylor.)

A. The same range of mountains, yes, sir. The Cedar Canyon mine is a very little west of due south of these claims.

Q. And there has been a great deal of work done on the Cedar Canyon mines, hasn't there?

A. Yes, sir.

Q. And a great deal of money taken out of there?

A. Lots of money taken out of there.

Q. What other claims did you speak about, did you speak about the Elephant?

A. The Elephant and the Deer Trail.

Q. Is the Elephant in the Deer Trail group?

A. Yes, sir, right in the bunch; they are all right there together.

Mr. MACDONALD.—That is all.

Recross-examination.

(By Mr. MOSBY.)

Q. That is 6 or 7 miles from this property?

A. Between 5 and 6 miles.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused. [98]

Monday, February 27th, 1911, 3 o'clock P. M.

Taking of testimony resumed at Spokane, Washington; all parties present.

**[Testimony of Elmer C. Brain, for Complainant.]**

ELMER C. BRAIN, called as a witness on behalf of the complainant, after being first duly sworn and cautioned to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

(Testimony of Elmer C. Brain.)

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Brain, please state your name, residence and occupation.

A. My name is Elmer C. Brain; my present residence is at De Borgia, Montana, and at present I am manager of the Gold Chrome Mining Company that is operating there at De Borgia.

Q. And what is your age?

A. I am twenty-five years old.

Q. I wish that you would state in a general way, Mr. Brain, what your experience has been in mining, what studying you have done and what actual practical experience you have had in mining.

A. Practically most all my vacations from school have been spent in mining districts, and since the latter part of the year 1906 I have been in mining districts all the time. I had started in a course of mining engineering and was interrupted through financial difficulties, and have since taken up the study very diligently, from what I could derive from [99] my own experience and from my own personal study.

Q. You are now engaged in mining, are you?

A. Yes, sir.

Q. As a business?      A. Yes, sir.

Q. And you have devoted practically all of your time, for five or six years, to mining, have you?

A. I have; yes, sir.

Q. That is to the practical side of mining?

A. Yes, sir.



(Testimony of Elmer C. Brain.)

Q. And you are familiar with the Hunter Creek group of mines which are located in section 28, township 30 north of range 38 E., W. M., in Stevens County, Washington? A. I am.

Q. When did you first become acquainted with those claims?

A. I first became acquainted with the claims in the summer of 1902.

Q. Under what circumstances?

A. I came there direct from school in Minneapolis and spent the summer, during the three months, with my cousin.

Q. I wish you would state what development work has been done upon that property there—you have visited it, I take it, from time to time, since then?

A. I have.

Q. And did you spend a considerable portion of your time there at any time?

A. I spent practically two full years there in 1907-08.

Q. I wish you would state, Mr. Brain, in a general way, [100] just what improvements have been made upon that property in a mining way.

A. When I first went there they were then working in three different places on the property, and since then, in my own measurement, I know there to be in the neighborhood of two thousand feet of development on the property.

Q. Is that tunneling and stoping?

A. That is tunneling, not any stoping. There is no stoping. Tunneling, shafting and drifting.

(Testimony of Elmer C. Brain.)

Q. What buildings have been erected upon that property for the purpose of mining and carrying on mining operations?

A. Why, all the buildings necessary in an ordinary mining camp have been erected on the property. That is a cook-house, blacksmith-shop, stable, barn, bunk-house and office for the company; that is an office.

Q. I wish you would state a little more in detail just what the tunnels are and the length of each.

A. The length of the main tunnel on the property driven to cross-cut the vein that is exposed on the surface goes in very steadily for about six hundred and seventy feet. There is a drift off of that principally to the right of very nearly the same length. There are three other little drifts to the right cross-cutting the leads and the mineral indications, and that is the main tunnel. Now, coming in on the ledge on the vein there is a tunnel that goes in for about 160 feet. Above that about 80 or 100 feet there is an open cut opening up the vein showing up this ore, just a small cut that goes in there about 15 feet. Further above that there [101] is a shaft that was sunk before the property was taken over by the present owners, that goes down 90 feet. And there is a drift that goes over about twenty feet and then another winze sunk down about twenty feet connecting a ninety foot shaft with this drift. Beyond this some four or five hundred feet there are open cuts that prove the continuity of this vein; and some short distance from this deep shaft, this 90-foot shaft,



(Testimony of Elmer C. Brain.)

there is another double compartment shaft sunk on an incline following the vein directly.

Q. Now, what ore, if any, has been extracted from these tunnels and shafts, and if any has been obtained or extracted, is there any of it on the ground at the present time or was when you were there last?

A. There is ore practically at the portal of every tunnel there, that is, mineral-bearing rock which is said to show the presence of commercial minerals.

Q. Now, what number of men have been at work at the various times that you were on the property, Mr. Brain?

A. When I first went there in 1902 there were about twenty men working actively on the property. When I went there at first in 1906, in the latter part of 1906 there were no men there at that time. There was some men on the property but they were not employed by the present owners. And after that practically the only men that were employed there were under me in my employ.

Q. Have you ever been a stockholder of this Hunter Creek Mining & Milling Company?

A. Not personally; no, sir. [102]

Q. Your mother was? A. My mother was.

Mr. MOSBY.—Did you say not personally?

A. No, not personally.

Q. When did you first begin to suspect that the land claimed by Mr. Allen, the defendant here, under his patent included the property of these mining properties which we have been discussing?

A. Well, when we—in 1908, when we went to go



(Testimony of Elmer C. Brain.)

into the subject of having those claims patented under the Mineral Act.

Q. What, if anything, did you *do determine* that question in the way of having a survey made?

A. I had personally gone over the ground roughly with a pocket compass or pocket transit and traced out those lines from the south, the southern township line, and later I went to Colville and employed a surveyor to come down to make that survey.

Q. And his name was what?

A. Mr. Thomas, was his name.

Mr. MOSBY.—Who employed him?

A. I did; I went for him.

Q. What is his first name?

A. Fred Thomas.

Q. Fred S. Thomas?

A. Fred S. Thomas; I think that is his full name.

Q. Have you any knowledge or experience yourself in surveying, Mr. Brain? [103]

A. I have.

Q. Now, did you accompany Mr. Thomas at the time he made this survey?

A. Yes, sir, both myself and my brother.

Q. You were with him all the time, were you?

A. Yes, sir.

Q. Now, I show you this plat. You have before you, Mr. Brain, Plaintiff's Exhibit 1. I wish you would state where you commenced to make that survey, and just what was done by you in making the survey. In indicating the points on the map here you may just refer to what is written opposite or

(Testimony of Elmer C. Brain.)

near each point, if you will, starting at the beginning.

A. Now, this was taken by Mr. Thomas.

Q. Yes. If you had gone over the ground yourself before that time, you may detail your own examination of it.

Mr. MOSBY.—Let the record show we object to any testimony on the part of Mr. Brain, by reason of the fact that he is not qualified as a surveyor to testify.

Q. What experience have you had in surveying?

A. I took a complete course of field surveying at the Armour Institute at Chicago, and had a practical knowledge of it afterwards, for the purpose of passing the examination at Ft. Leavenworth.

(By Mr. MOSBY.)

Q. When was this?

A. This was in the fall of 1906. I was there in the Armour School during 1906. I left directly from those examinations to come straight here. [104]

Q. Did you receive a diploma from that institute?

A. No, sir; I did not go through that school because—

Q. Did you ever have any actual experience in field work and surveying?

A. In field work just simply as a chain-man.

Q. Not with a transit?

A. I never handled a transit only just with the practical school course, as they teach you. I surveyed all around the ground and the fields, all over that, and assisted in college work.

Q. You never had any other experience at all?



(Testimony of Elmer C. Brain.)

A. Not in a practical way; no, sir.

Q. (Direct resumed.) If you had gone over the ground yourself before that time you may detail your own examination of it.

A. I had previously gone over this ground, in hunting and with compass, working, and had found, had run across this corner. That is practically the southwest township corner of this. I had previously found this township corner here which is marked on this map as the southwest corner of township 30 north range 38. The stake and witness trees are in place as I had previously seen and when taking him—when accompanied with Mr. Thomas I took him directly to this township corner. We then proceeded west along this township line—I mean east. We then proceeded east along this township line coming to posts that were set in there, but which I know myself were not Government set posts. They did not conform with the way that Government survey posts are placed, [105] and which posts is marked on this map as: “Found  $\frac{1}{4}$  set by unknown party,” this quarter post being half a mile from the township corner post which we know is a Government post. We then proceeded half a mile further east coming to another  $\frac{1}{4}$  post marked on this map “ $\frac{1}{4}$ , found corner set by unknown party.” We then proceeded half a mile—

Q. Was that a Government post?

A. No, sir; there are only two Government posts that I know to be Government posts along this whole township line or beyond this, that is the corner post,



(Testimony of Elmer C. Brain.)

the township corner, and this other one away over here which is over three and a half miles further.

Q. Proceed.

A. We then proceeded further east for half a mile coming to the quarter post of section 32 and then proceeded another half mile. That post was knocked over. We then proceeded a half a mile further to the quarter post between the two sections 32 and 33 in the above township marked, "Set hub here." We then ran a line straight down the township line for a mile east, coming to the point that is marked as "Set hub at section corner," that being between sections 33 and 34. We then returned as it was night when we got there, and the next morning we started in at the point on the township line marked, "Set hub here," between sections 32 and 33 on the south township line. We then proceeded straight north, giving the transit the regular deviation that that country all calls for there of 22-30. We then proceeded straight north for a mile and a half and set a hub at the point that is [106] marked on this map "Set hub here," and which would be the southwest corner of the plot marked "A." From this point we proceeded half a mile east, setting the point we arrived at, what we were aiming at, the center post of section 28, and which is marked on the plat as "Set stake here" and being the southeast corner of tract "A." We then returned to the south township line and starting at the point marked on this map "Set hub at section corner," we proceeded a mile north at the correct deviation and arrived at

(Testimony of Elmer C. Brain.)

the point on this map marked "Set hub here," which is the section corner between sections 33, 34, 27 and 28. We then ran west half a mile arriving at the point on this map marked "Set hub here," and from this point ran half a mile north, again arriving at the point that we were driving at, the center of section 28. These lines did not jibe exactly and were adjusted there by equalization or by proportion as the surveying term is—which is further described on this plat as "Set stake here" and is again the southeast corner of plot "A." Now, at that point we sighted our lines from there, and did not go any further with the surveying, excepting for a man named Joe Peel. That is all the surveying we did. We did not bind up the section entirely.

Q. I will ask you to state, Mr. Brain, from your knowledge of the country and from the survey concerning which you have testified, as to whether or not the tunnels and the buildings of the Hunter Creek Mining & Milling Company were within the exterior limits of this Tract "A."

Mr. MOSBY.—I object to it as he is not properly qualified. [107]

A. They are according to that survey.

Q. Now, in a general way, Mr. Brain, I will ask you if these tunnels and buildings and the bunk-house and so forth are down here as indicated on this plat in the southeast corner of Tract "A"?

A. We found them to be placed so.

Q. Now, could you tell us how close to the east line of tract "A" the portals of the tunnels are?



(Testimony of Elmer C. Brain.)

A. We did not run that line; we just simply sighted that line from the transit here. I looked through the transit and verified it, that it was set at the right deviation, and it looked to me from that point that this line would pass about not over 100 feet east of the portal of the tunnel, of our large main tunnel.

Q. Now, state, Mr. Brain, in which direction that main tunnel runs, taking its portal, we will say, 100 feet west of the east line of tract "A," in which direction does that tunnel then run?

A. Why, that is my exact opinion now, that that tunnel runs just about west by north—just about west of north—or north of west—I beg your pardon, it is north of west.

Q. So that as the tunnel progresses it penetrates further into the tract "A"?      A. It would.

Q. And the same is true, is it, of the other tunnel?

A. No, sir, the other tunnel goes in a northerly direction.

Q. How far is its portal from the exterior limits of [108] tract "A"?

A. Its portal is about—about now, about 400 feet north of the southern line of tract "A."

Q. Yes, sir.

A. And about 600 feet west of the eastern line of tract "A."

Q. Did you ever have any conversations with Mr. Allen concerning the question as to whether or not these mining improvements were within the limits of tract "A"?      A. I have.



(Testimony of Elmer C. Brain.)

Q. I wish you would state when and where those conversations occurred and the substance of them, if you remember.

A. Well, I had met Mr. Allen off and on a number of places and brought the subject up with him and gave him to understand that we would like very much to purchase this tract of land from him for a reasonable consideration, thinking at the same time that it would be cheaper for us to purchase the claim from him rather than try to defeat his title.

Q. Were any offers or proposals made by you as to the pecuniary consideration that you were willing to give to him?

A. I had always tried to get Mr. Allen to place a figure on it before offering him any set consideration, to try to find out what he regarded as the actual value of the property in his sight.

Q. Did he ever make a proposition to you as to what he would be willing to accept in cash?

A. We had—by we, I mean my mother and I had met Mr. Allen one day in Spokane and had asked him what figure he would take [109] for this property. We had started out with the figure we then had learned what the whole tract had cost Mr. Allen, and offered to pay him the full amount that he had paid for the whole 160 acres for this forty acres that was in dispute. Mr. Allen flatly refused it and we then went on trying to set a figure on it, and before Mr. Allen would say or set any figure he had arrived at the five thousand dollar mark, claiming that he would accept nothing less than five thousand dollars

(Testimony of Elmer C. Brain.)

for his tract. And this we thought unreasonable at the time, but with that as our basis we drew up a contract with Mr. Allen to the effect of purchasing this land from him.

Q. That contract was signed by Mr. Allen, was it?

A. Yes, sir.

Mr. MACDONALD.—We will get the original contract later on.

Q. Now, was any work done there in 1909?

A. Yes, sir.

Q. And what was that, Mr. Brain? I think that is the time that Monaghan was up there.

A. No, not Monaghan. This work was done there in 1909.

Q. What was the character of that work?

A. The character of the work was more in the straightening up of timbers, some of which had fallen over by the movement of the ground.

Q. Were any new tunnels driven or not?

A. There was one small drift driven; yes, sir.

Q. About how much was that?

A. It was only about—there was only about 15 feet of work done in it. [110]

Q. Did Mr. Allen ever visit these mining improvements while you were there?

A. Yes, sir; Mr. Allen came there when I was there in the latter part of 1906 or the first of 1907; I don't remember which.

Q. Did he stay overnight at the camp there?

A. He did one night; yes, sir, with his son.

Q. Did you take him through any of these tunnels

(Testimony of Elmer C. Brain.)

or show him any development work or improvements?

A. Yes, sir; I took him back in our main tunnel at the time and showed him the mineral back there and he mentioned at the time, I remember, that this was the first time he had ever been back there and been shown the proposition.

Q. You have known Mr. Allen here for several years, have you not?      A. Yes, sir.

Q. And he has other property in the immediate vicinity of this tract "A," has he?      A. Yes, sir.

Q. Do you know whether or not he has any mining claims close to tract "A," or land located as mining claims?

A. He has some claims just north of our property.

Q. How far north, Mr. Brain?

A. Why, not over half a mile at the outside.

Q. That would be in the southwest quarter of section 21, probably, would it?

A. Yes, sir, the southwest quarter of section 21.

Q. Do you know what development work has been done by him [111] on those claims in section 21?

A. Why, I have been there and seen his sons working. I have never seen Mr. Allen personally working there, but I have known that they have done development work there for mineral.

Q. Have you ever had occasion to form an opinion as to whether or not those claims were on the same strike of the vein as the claims in tract "A"?

A. Personally, I have not, but I have known that it was claimed by our former manager there, that



(Testimony of Elmer C. Brain.)

that was a continuance of our own vein.

Mr. MOSBY.—I object to that and move to strike it out as hearsay.

Q. Now, what other mining development is there around there in the vicinity of tract "A" other than what you have described?

A. There is very extensive mining development north of us within a radius of a couple of miles and also southwest of us, and in what is known as the Togo mining proposition.

Q. How far away is the Togo mining proposition?

A. In a straight line the Togo mining proposition is about a mile and a half from us.

Q. Has any considerable money been spent there?

A. Yes, sir, there has; they have been plugging along steadily there for at least eight years that I know of.

Q. Do you know whether they have been working within the last year or so?

A. No, sir; I have not been in touch with the camp lately, [112] not personally for the last year since I have been in Montana.

Q. At the time you left there were the Togo people still at work there?

A. They were at work there, yes, sir.

Q. In a general way, state the development work they had done in the way of tunneling and drifting and stoping and shafting.

A. The last time that I was at this camp was with a view of forming a consolidation of all those mining properties there—

(Testimony of Elmer C. Brain.)

Mr. MOSBY.—I object to any testimony in reference to what the Togo Mining Company was doing.

Q. Go on.

A. We were figuring on the consolidation of the prospects and mines there with a view of reopening the Turk Smelter, that was built within six miles of the claims and with that in view we went through every prospect which we thought there was ore in, together with a mining expert and engineer, Mr. J. C. Edwards. We went down in the Togo workings there and examined their outcroppings and their showings, wondering if we could depend on ore from them to put the smelter on its feet.

Mr. MOSBY.—My same objection goes to all this line of testimony.

Mr. MACDONALD.—Yes, sir.

A. (Continued.)—and there is also a very good mineral showing just within about a mile southwest of our proposition [113] there known as the McCullough claim.

Q. What conclusion did you reach, Mr. Brain, as to your ability to get profitable ores from the Togo people for smelting purposes?

Mr. MOSBY.—The same objection.

Q. In other words, did you regard that as a mine that could be profitably worked as a mine?

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial.

A. With the view of that smelter both Mr. Edwards and myself, from the assays that we took from the Togo mine, we proved that the Togo mine would

(Testimony of Elmer C. Brain.)

be a very good addition to the smelter.

Q. Have you ever had occasion to investigate as to whether or not the Togo property is on the same general strike of the vein as the Hunter Creek property?

A. That is too long a jump to say whether that is the same vein or not, but it is in the same ridge and the same range.

Q. In the same mineral zone, is it?

A. It is in the same mineral zone, the character of the rock is similar, and the trend of the formation is the same.

Q. You have gone over that whole country around there, have you not?      A. Yes, sir, I have.

Q. I wish you would state what the character of the country is in your opinion, as to having mineral-bearing rock and being what is generally known as a mining country.

A. Why, the whole district in there is very, very—well, [114] frequently outcroppings there of mineral-bearing rock. You can find copper-stained float about there which, if it were in any of the other larger camps—Butte, for instance—would be regarded as a whirlwind.

Q. Now, Mr. Brain, you have gone over your own property there in tract "A" a great many times, of course?      A. I have.

Q. And are thoroughly familiar with them?

A. Yes, sir.

Q. I wish you would state, now, what the general



(Testimony of Elmer C. Brain.)

surface indications are as to being valuable for mineral.

A. The surface indications there are very plainly marked. There is a fine outcropping there for about all the way from 18 inches to three feet wide of very heavily and very plainly green stained copper ore rock or copper-bearing rock, and it is also, from personal assays that I have had made, proven to contain both gold and silver and in the lower tunnel I have got Tungston assays from it.

Q. You have made frequent assays from time to time, have you, Mr. Brain?      A. I have.

Q. Now, I wish you would describe what the showing in this underground, the character of the vein and the rock in place and so forth.

A. Back of the main tunnel there is an 18—about an 18-foot vein of ore bearing matter there of a pyritic nature, very prominent in pyritic iron and containing some pyritic copper, but it is a foreign vein to the one that I think is [115] the outcropping vein above. I really think that it is a different vein entirely from the main vein that we were driving to catch.

Q. You may state what the fact is as to whether or not there are more than one vein disclosed by the underground workings or if not more than one vein whether you encountered a number of stringers.

A. There are at least five separate stringers, individual bearing veins or bearing rock in the lower tunnel.

Q. Now, Mr. Brain, I will ask you from your

(Testimony of Elmer C. Brain.)

knowledge of the surface showing upon that property and of the showings as disclosed by the underground developments, whether in your opinion there is a sufficient showing to justify further development there for mining purposes.

A. That proposition at the present point of development requires nothing but further development. At the present showing there, taking everything into consideration, why that property requires further development.

Q. You do not catch my point. I say from the showing that is there made, do you think a person is justified in spending money in the development of that property? A. I certainly do.

Q. In other words, what, in your opinion, is that particular property most valuable for, whether for mining or something else?

A. Why, the only thing that that property is valuable for, in my estimation, is mining.

Q. Well, then, in your opinion, that property is more [116] valuable for mining than it is either for stone or timber? A. Yes, sir.

Q. Now, what is the character *to* that tract "A" with reference to its timber, Mr. Brain?

A. Why that tract "A" has very little lumber on it, that is, timber that is that would be of a commercial value as far as lumber is concerned. There are just some little trees on there that would only be—that is, the most value or worth of them would be there for mining timbers.

Q. You have been on this property a good deal



(Testimony of Elmer C. Brain.)

and have been associated with those who were operating it. I will ask you to state whether or not you know whether they have abandoned this property by reason of not believing it to be successful.

A. They certainly have not.

Q. Or capable of success as a mining proposition?

A. They certainly have not.

Q. Are you able to state whether they have always maintained a belief that with sufficient development it would develop into a paying property?

A. They do.

Q. You have spoken about a contract which Mr. Allen entered into with some person, I believe, on behalf of the Hunter Creek Mining & Milling Company. Did you ever have any conversation with Mr. Allen previous to the entering into of that contract?

A. Why, yes, sir.

Q. About that contract?      A. Yes, sir. [117]

Q. Was anything said or asked by Mr. Allen when he made this contract, as to the requiring of certain development work to be done on the mine there?

A. Mr. Allen had asked me as to the serious intent of our people in developing the proposition and I assured him that was the case that that was their serious intent.

Q. What, if anything, did he say or do in reference to requiring further development work to be done in the event that he made this contract? I am speaking of the time, now, before this contract was finally entered into.

A. Mr. Allen was very agreeable about the prop-



(Testimony of Elmer C. Brain.)

osition, he wanted to see the country go ahead, or gave me to understand that he wanted to see the country go ahead as well as we did.

Q. Did Mr. Allen say or do anything which would show in his mind, or opinion, that those claims were valuable as mining claims? In other words, that he regarded them as being susceptible of development and did he not also, in this contract, make certain requirements as to its being further developed?

A. Yes, sir; he did and he gave me—he made the remark that the development of our present proposition there, that is, putting up the reduction plant of any kind would increase the value of his own mineral holdings.

Q. And he regarded those mineral claims of yours as being valuable for mining purposes as you gathered from the inference?

Mr. MOSBY.—I object to it as leading.

A. He did. [118]

Mr. MACDONALD.—That is all.

Cross-examination.

(By Mr. MOSBY.)

Q. Mr. Brain, when did you first go on this property? A. In June, 1902.

Q. In 1902? A. Yes, sir.

Q. It was then about four years from the time that you went in there in 1902 until the time that you went in there as an employee of the Hunter Creek Mining & Milling Company to do certain assessment work? A. Yes, sir.

Q. The time you went in there to do this assess-

(Testimony of Elmer C. Brain.)

ment work, Mr. Brain, you fix as when?

A. As in the latter part of 1906.

Q. In the latter part of 1906? A. Yes, sir.

Q. Don't you think, Mr. Brain, it was 1907 before you began doing any assessment work on those claims? A. No, sir.

Q. Who accompanied you, Mr. Brain, on this trip?

A. A man by the name of Morris.

Q. Was there anyone else?

A. No one else that went out there with me; no sir.

Q. Can you fix the exact day in December, 1906, in which you and Mr. Morris went on the property?

A. I arrived in Springdale from the east the very last day of 1906. [119]

Q. The very last day in 1906?

A. I immediately took Mr. Morris from Springdale and dressed and went in the cabin and started work that night.

Q. What is the distance from Springdale to the property?

A. The distance is a good twenty miles.

Q. What time did you leave Springdale?

A. We left Springdale about—I got into Springdale about 12:30, I think it was, and left there about three in the afternoon or half past three.

Q. This, as I understand, is on the 31st day of December, 1906? A. Yes, sir.

Q. What time did you and Mr. Morris arrive on the ground?

Mr. MACDONALD.—Let this be understood as all going in under my objection to it as immaterial.

(Testimony of Elmer C. Brain.)

A. Why, it was hard traveling there; it was very heavy snow there at the time and very slow traveling. We didn't get in there until about eight or nine o'clock.

Q. Eight or nine o'clock? A. In the evening.

Q. After you got there did you find, or did you not find anyone on the property there?

A. Yes, sir; there were four men.

Q. There were some men there?

A. Yes, sir; there were four men there.

Q. How many? A. Four men. [120]

Q. How long had they been there, those four men?

A. I don't know exactly; they had not been there more than a day or so, anyway.

Q. A day or so?

A. Yes, at the outside. I don't know exactly how long they had been there.

Q. They had done no work before you and Mr. Morris arrived there?

Mr. MACDONALD.—The same objection.

A. Not a bit.

Q. You and Mr. Morris arrived there about nine o'clock at night? A. Yes, sir.

Q. Did you get your supper after you got there, down there? A. Yes, sir.

Q. And it was about ten o'clock, then, before you started to work, at least, wasn't it? A. Yes, sir.

Q. You started to work at what place on that tract "A," Mr. Brain?

A. We started to work now, we—I just went out and started work that night. I just went out there



(Testimony of Elmer C. Brain.)

and started work in the main tunnel, that is, back about 90 feet from the portal of the tunnel. Those men were there with the intent of jumping the proposition. It was a former manager of the proposition that had turned against the company, and he was there with the idea of jumping those claims and they came out; they all went out there with me and I went out and started to work [121] that night and went back in this tunnel and started picking down rock and running the drift in there and it was assessment work, and I started work there in the name of the Hunter Creek Mining & Milling Company.

Q. Where was Morris at this time?

Mr. MACDONALD.—The same objection.

A. Morris was there with me, I think.

Q. He was with you in the tunnel?

A. I think he was.

Q. How much work did you do there, Mr. Brain?

A. I didn't work over just a little while there. I was tired out and it was late at night. I just worked a little while there, just to show them that we had not abandoned things there by any means and did not figure on quitting there.

Q. Did you work as much as an hour?

A. No, sir.

Q. As much as half an hour?

A. No, I don't believe I did; I don't believe I did.

Q. You didn't work as much as fifteen minutes there, probably?

A. No, I didn't work steady work there. I just

(Testimony of Elmer C. Brain.)

simply went there and just started work to show them I started.

Q. You probably didn't work more than ten minutes, Mr. Brain, when it comes to a show-down?

A. No, no; I didn't work seriously there then. I didn't go there to work long.

Q. You didn't work there as much as five minutes?  
[122]

A. No, no; I didn't go there with the intent of starting work—work of that kind.

Q. You didn't work very probably as much as a minute on that night, did you? You didn't work five minutes, you said?

A. Well, it took me more than five minutes the next morning to shovel out the muck to get the car in.

Q. I am not talking about the next morning, but about that night.

A. The muck I knocked down that night.

Q. Well, it was less than five minutes, anyway, wasn't it? You said it was not more than five minutes.

A. Well, it was not more than five minutes. I don't know whether it was less than five minutes or not.

Q. Well, what did you do afterwards, Mr. Brain?

A. Well, I was plumb tired out that night.

Q. You went to bed, I suppose.

A. I went back and went to bed; yes, sir.

Q. Well, did you do any work the next day?

A. Yes, sir.

Q. Now, isn't it a fact, Mr. Brain, that no work



(Testimony of Elmer C. Brain.)

was done by either you or Mr. Morris between the time you speak of and the 4th day of January, 1907?

Mr. MACDONALD.—The same objection, and move to strike it out.

A. Our cabins were just about to cave in from snow, and we began shoveling off the snow and fixing the bunks for staying there the first days we were there. We began arranging things to stay there and was my intention of leaving Mr. Morris to work there and going to town to get more men, and [123] the first days, I think, we just prepared for these other men we intended to bring into the camp.

Q. When was the first work after January 1st, 1907, when was the first work that was done actually in the mining property proper, that is, the tunnels or the shafts?

A. Why, it was just a few days. I don't remember exactly how long it was after that but just a couple of days after that; it was along in the first few days in the month.

Q. Then, what work did you do—what work was done there then?

A. We started in an open cut. I wanted to try to catch that vein on the other side of the little creek as it pointed down there. I wanted to catch that vein to prove the continuity of the vein further and we started in the little cut on further there.

Q. How long did you work there?

A. Oh, I left Mr. Morris working there and went to town. After that I left him working there and I started in with the intention of getting more men.



(Testimony of Elmer C. Brain.)

Q. Mr. Morris was the only man there representing you and the Hunter Creek Mining & Milling Company, representing you there, as I understood? These other people were men expecting to jump the claim?

A. Yes, sir, but they left before I woke up the next morning; there was no one there then.

Q. Well, can't you specify in feet just what work was done in this locality mentioned, by you and Mr. Morris, before you left for town?

A. No, I don't remember. [124]

Q. You don't know?

A. We started in working on an open cut there.

Q. Did you start in or did he start in or did the both of you start in? A. We both started in.

Q. And you don't remember just how long you worked there before you went to town?

A. No, I forget, if it was eight or ten days, or whether we were there only three or four days. I forget how long we were there before I went to town and left Dick there.

Q. But you left Mr. Morris do the work, didn't you—you didn't do it yourself?

A. I certainly did, yes, sir; I worked with him.

Q. You did?

A. Yes, sir, just as much as he did. There was nothing else that I was up there for.

Q. You can't state in square feet or square yards just what work was done in this open cut?

A. Oh, no; this was an open cut. I don't remember that.

(Testimony of Elmer C. Brain.)

Q. In which direction would the open cut lie from the main tunnels?

A. That open cut was about 300 feet southwest of the main tunnel, of the portal of the main tunnel.

Q. Three hundred feet southwest of the main tunnel? A. On the vein; yes, sir.

Q. How many tunnels did I understand you to say there were on the vein?

A. Two main tunnels.

Q. Two main tunnels? [125]

A. Yes, sir, and then there are one or two other small tunnels on the drifts.

Q. The main tunnel, you said, was something over 600 feet? A. Yes, sir.

Q. In length? A. In a direct straight line.

Q. And what was the smaller of the main tunnels?

A. Why the other. There is no other smaller main tunnel; there is a drift off of it.

Q. I thought you said there are two main tunnels.

A. There are two main tunnels; yes, sir.

Q. You said that the length of the main tunnel was six or seven hundred feet, I believe. Are both of the main tunnels the same length? A. Oh, no.

Q. One of them, you said, was six or seven hundred feet in length? A. Yes, sir.

Q. What is the length of the other one?

A. The other one is about 160 feet.

Q. About 160 feet? A. Yes, sir.

Q. What do you call that—that is one of the main tunnels?

A. Yes, sir; that is one of the main tunnels that

(Testimony of Elmer C. Brain.)

drifts in on the vein. Our main tunnel goes in and cross-cuts the vein. This other little tunnel, that is, the other main tunnel that you refer to, is a tunnel that goes in on the vein. It is considerable above the plane of the other tunnel and around [126] on the vein, running in the direction that the vein does.

Q. How many other tunnels besides these two you have just discussed, Mr. Brain, are there?

A. There are two other small tunnels.

Q. Two others? A. Yes, sir.

Q. How many shafts are there, Mr. Brain, on these mining claims? A. There are three shafts.

Q. Three shafts? A. Yes, sir.

Q. What are the respective depths of those shafts, Mr. Brain?

A. The first shaft that was driven on the property, the old Homer Linton shaft, that is about 90 feet deep; the other shaft is about 46 and the other smaller shaft further along on the vein is only about 18 or 20 feet.

Q. Coming back to this open cut I will ask you again, Mr. Brain, what work was done on that open cut during the time that Mr. Morris was there as an employee of yours?

Mr. MACDONALD.—I make the same objection.

Q. My object in driving that open cut was not simply just to do work; it was to try to catch the vein just beyond this little creek on the other side—

Q. I don't care about what your purpose was. What I want to find out is how much work was done by you and Mr. Morris at the time of this visit that



(Testimony of Elmer C. Brain.)

you paid there, at the time in which you were present and the time during which you were there on your return. I simply want to find out how much [127] work was done by you and Mr. Morris on that open cut at that time, in feet.

A. Let's see. We only went in there to find solid formation. We found solid formation in there in about—oh, in about 14 or 15 feet.

Q. Do you mean to say then, Mr. Brain, that you and Mr. Morris went in on this open cut about 14 feet? A. Yes, sir.

Q. What, if any, other work did you or Mr. Morris do in the way of assessment work on these properties of the Hunter Creek Mining & Milling Company at that time?

Mr. MACDONALD.—I make the same objection.

A. At that time we did not do anything more than that work.

Q. How long were you and Mr. Brain there at that time?

Mr. MACDONALD.—The same objection.

A. We were there for about two weeks, just about two weeks, and then I had to let Dick go. I let Dick go and remained there longer.

Q. Was there any further work done, after he went away, by you?

A. No; no more than just the watching of the camp and keeping the snow from crowding on the buildings and breaking through; there was a very heavy snow there.

Q. Now, you spoke of having some assays made

(Testimony of Elmer C. Brain.)

from the ore that you got from the properties, Mr. Brain? A. Yes, sir.

Q. Where did you get the ore that you had assayed?

A. Well, I got ore from at least a dozen different places, good average samples of ore.

Q. Did you get any of it up from the shafts? [128]

A. From the deep shaft; yes, sir.

Q. Which was the best ore you found, Mr. Brain, from the shaft or from the tunnels?

A. The best ore that I found was from the tunnel that drifted in on the vein.

Q. Do you now refer to the smaller tunnel 170 feet? A. The tunnel about 160 feet; yes, sir.

Q. Did the character of the ore get better or worse as you went into the ground, Mr. Brain—did the assays run better or worse as you ran deeper into the shaft or further into the tunnel?

A. The highest assay that I got from there came from the deep shaft, the 90-foot shaft, only down about 60 feet, just. That assay came. That was in rock that was surprising to me, because I always thought that the proposition was a copper proposition and this gave me a very high assay in silver.

Q. Down below there, what did you get?

A. I got wet.

Q. You got nothing?

A. I struck the water down there and didn't take any sample.

Q. And what is the character of the ore on the face

(Testimony of Elmer C. Brain.)

of the longest main tunnel?

A. It is a pyritic ore.

Q. Did you get any samples from that?

A. Yes, sir.

Q. How did those samples run?

A. Those samples just ran—well, they ran light in copper, in around five to six per cent, and only in copper values. [129]

Q. Do you know how the samples from the mouth of the tunnel ran?

A. The samples from the mouth of the tunnel contained gold, assayed gold which ran seven dollars a ton. The samples that came were samples that I took from that straight across the face. Of course, the face was about 16 feet and in the tunnel about 85 or 90 feet, in the main tunnel. That contained seven dollars in free gold.

Q. As you went in further, the other five hundred feet, or, say, in between five and six hundred feet, did you get any samples then?

A. I did not take any samples from this 90 foot one; in the tunnel about 90 feet, after taking that sample, I then skipped for about 350 feet and took a sample from across the face of ore that was cut about 18 feet; there was an 18-foot pyritic vein there that only ran about—I sent that sample to the Granby Smelter and they gave me a return of three and some per cent copper on that, across this 18-foot vein.

Q. Did you drift along that vein any?

A. No, I did not.

Q. Has anyone ever drifted along that vein?



(Testimony of Elmer C. Brain.)

A. No, they have not; no, it is too low.

Q. You don't know whether it is a mere pocket there or not?

A. No; I know it is not a mere pocket because it is on both sides of the tunnel which goes through there and shows it to be at least eight feet wide, and they cut it also in the long drift off in the right tunnel.

Q. That is not the vein, though that you expected to strike [130] when you went in?

A. No, it is not.

Q. Did you ever strike the vein that you expected to strike when you went in?

A. Yes, sir, I think we did.

Q. Where, in the main tunnel?

A. In about—about five hundred and twenty feet.

Q. How was that assay, how did the samples from that assay? A. That assay was low.

Q. In what?

A. In copper; very low in copper; it assayed only about four per cent copper and that is very small.

Q. What was the commercial value of that copper at the time you had the assays made?

A. At the time I had those assays made copper was twelve and a half.

Q. Well, what I want to find out is what the commercial value a ton would have been of the copper taken from that vein.

A. Oh, the copper from that vein would only be about four per cent copper; that would be sixty ton of copper to the ton of ore and the smelter would only pay ten cents a pound; it would only be about six dol-

(Testimony of Elmer C. Brain.)

lars a ton or eight dollars a ton because they worked some—

Q. It would not pay you, then, to mine, treat, transport and pay the smelter charges on such ores?

A. It would, to treat it.

Q. But I am speaking about getting it out so you could get your money out. [131]

A. It would to treat it. If we had a reduction plant on the proposition to treat that and concentrate that ore, it would pay to ship, as it is, but it would never stand the haul.

Q. How much of this ore is there, Mr. Brain, do you know?

A. Why in—there is blocked out there now between these two tunnels, a body of ore about, as I say, about 18 feet wide and about 200 feet long; that is, judging from the two tunnels. Now, understand, the lower tunnel level is at least 150 feet below the upper tunnel level.

Q. I understand.

A. The upper tunnel where it cuts the vein is about 200 feet from this lower tunnel directly south of it. Where this cuts the vein may have the same vein up in this upper tunnel, and it is called “blocked out” there when it is bounded on two sides there by the open work, and there is a stretch of ore there for about on a diagonal it would be about 240 feet.

Q. These two tunnels are not connected in any way? A. No, sir.

Q. There are not any upraises?

A. There isn't; there is no connection.

(Testimony of Elmer C. Brain.)

Q. There is no drifting on either of the tunnels?

A. Yes, sir, there is drifting on the lower tunnel.

Q. How much?

A. There is at least 600 foot of drifting on the lowest tunnel.

Q. Towards the other?

A. No, sir, towards the right, going away from the other [132] vein. The other side would come out—you understand, the hill slopes towards the other tunnel, and this brings that vein back deeper in the hill.

Q. How does the ore in the face of the tunnel assay, Mr. Brain?

A. The ore in the face of the tunnel assays—really, I don't remember the exact percentage of that. I didn't take samples there much.

Q. You assayed it, didn't you?

A. It assays in copper. You can see the copper ore there at the tunnel. I didn't assay there right at the face of the tunnel. There is a little drift in there that I never knew anything about. It was found, it was opened after I took my samples, and I didn't see any ore in there. It looked the very same character as the samples I had taken before.

Q. When did you take those samples, Mr. Brain?

A. I took them in nineteen—Oh, I took them in three—there in 1907 and '08 and '09, off and on, at different times.

Q. Now, you said that you were on the property about two weeks at the time you and Mr. Morris visited there? A. Did I say that?



(Testimony of Elmer C. Brain.)

Q. That is my understanding.

A. I said I sent Mr. Morris down there for about two weeks.

Q. How long did you yourself remain there?

A. I remained there for about a month.

Q. For about a month there?      A. Yes, sir.

Q. And I understood you to say that you yourself did no [133] further work there?

A. No, sir; I didn't do any further mining work there.

Q. What was the money value of the work that you and Mr. Morris did that winter?

Mr. MACDONALD.—I object to it as incompetent, irrelevant and immaterial.

A. Well, I don't—I don't know. It wasn't over—not much over one hundred dollars; that is, the work that we did there.

Q. Not much over one hundred dollars?

A. No, sir, at that time; that is about all the work we did there.

Q. What work was done on the property, Mr. Brain, when you first went there—what work had been done on the proposition when you first went there? Were these shafts and tunnels and the buildings that you have heretofore described, were they all on the property when you first went there?

A. No, not all of them.

Q. In 1906?

A. No, oh, no; there has been—there has been three main buildings put there since then, and altogether there has been about 200 feet or about 150 feet of

(Testimony of Elmer C. Brain.)

development work done.

Q. Where and in what way was this development work done?

A. This development work was done in—well, in driving tunnels in there, in cross-cutting, and the building work was done in—well, our main building work there was done for—with a view of installing this reduction machinery, this concentrating machinery that we were figuring on.

Q. What relation are you to Mrs. M. L. Brain, formerly manager [134] of the Hunter Creek Mining & Milling Company, Mr. Brain?

A. I am her son.

Q. Talking about the ore in the tunnels or in the shafts, Mr. Brain, did the ore in the shafts get better as you went down, or not?

A. Why, the ore did get better as we went down, yes, sir, but the vein did not get wider.

Q. But the vein did not get wider? A. No.

Q. As a commercial proposition, then, as a mining proposition, then, the property became less valuable as you went lower in the tunnels and less valuable as you went further in the shafts?

A. I did not say that.

Q. No; but I am asking you that question.

A. No, sir, it did not.

Q. You spoke of certain pyritic ore that you found in the tunnel. Is that copper or iron pyritic ore?

A. Both.

Q. Was it that ore to which you referred when you spoke of getting certain assays?

(Testimony of Elmer C. Brain.)

A. Yes, sir, the assays from the tunnels were from this pyritic ore.

Q. Mr. Brain, how many feet of timber is on that tract "A," would you say?

A. No; I am not a cruiser; I could not say.

Q. You said that you thought that tract was not valuable for anything excepting mining purposes?

[135]

A. Yes, sir.

Q. It has some timber on it, hasn't it, Mr. Brain?

A. Yes, sir.

Q. You said the timber would not be valuable to make ordinary lumber—is that what I understood you to say?

A. Well, the trees, most of the trees that are on there are too small for logging or for sawmill or for commercial sawmilling to monkey with.

Q. Well, wouldn't they make good timber for fuel purposes?      A. For our purpose?

Q. No; I say, wouldn't those trees be good timber for fuel purposes, to burn?      A. Oh, yes, sir.

Q. You don't know how many feet of timber there is on that ground?      A. No.

Q. Have you a general knowledge of the character of the land in that township and range—that is, township 30, range 38?      A. Yes, sir.

Q. Township 30 north and range 38 east, isn't it?

A. Yes, sir.

Q. What is the character of the land in that township and range, Mr. Brain?



(Testimony of Elmer C. Brain.)

A. The character of the land—do you want the rock formation?

Q. The surface character of the land there.

A. Why, the surface character of the land—

Q. That is, is it wooded, with reference to being wooded or [136] not, is it a timbered country or not?

A. Yes, sir; it is more or less timbered and exceedingly rough.

Q. Do you know of any timber and stone locations in the immediate locality of that tract "A"?

A. Yes, sir.

Q. How many do you happen to know of?

A. Oh, I know of—Oh, I know of half a dozen of them.

Q. Half a dozen around there? A. Yes, sir.

Q. Do you know of any timber and stone locations in section twenty-eight of that township and range besides that of Mr. Allen? A. Yes, sir.

Q. How many do you know of there?

Mr. MACDONALD.—I object to it as not the best evidence of timber and stone locations.

A. I know of two there, both on the southern quarters of section twenty-eight.

Q. Do you know the names of the locators of those claims?

Mr. MACDONALD.—I make the same objection.

A. I know of the name of the locator of the southwest quarter.

Q. What is the name of that locator?

Mr. MACDONALD.—The same objection.

(Testimony of Elmer C. Brain.)

A. My mother located on the southwest quarter. That is a sort of a bottom tract in there; it runs right along that creek. [137]

Q. Your mother, Mrs. M. L. Brain, Mr. Brain, located on the southwest quarter of section 28 in township 30 north of range 38 E., W. M.?

A. Yes, sir.

Q. As a timber and stone claim? A. Yes, sir.

Q. Now, coming back, Mr. Brain, to the matter of the survey made by yourself or rather made by Mr. Thomas upon which survey you accompanied him, in reference to the point from which you and Mr. Thomas first started, that is the southwest corner of section 31 in township 30 north, of range 38 E., W. M.; you don't know, Mr. Brain, whether or not the line from that point to the southeast corner of section 36 in the same township and range is or is not exactly six miles in length?

A. No, sir, I do not.

Q. It might be, then, considerably longer or shorter than six miles in length, as far as your personal knowledge goes?

A. I don't know exactly. Yes, sir, it may be longer or shorter.

Q. You don't know, then, how much longer or how much shorter it is, Mr. Brain? A. No, sir.

Q. In reference to the point from which you and Mr. Thomas started north, from that south line, the boundary of this township and range mentioned, that is, the southwest corner of section 33, being the southeast corner of section 32 in this township and range,

(Testimony of Elmer C. Brain.)

you don't know whether or not that line extended through to the northern boundary of the township and [138] range aforesaid, is or is not longer than six miles in length? A. No.

Q. Neither yourself nor Mr. Thomas made any survey of that line?

A. No, sir, not clear through; we made a survey of the line to the extent I said.

Q. You went to this point here (indicating on exhibit)? A. Yes, sir.

Q. You went up a mile or so beyond the tract "A"?

A. Yes, sir.

Q. But you did not go within two or three miles of the northern boundary?

A. No, I never went clear to the northern boundary.

Q. How much of a discrepancy, Mr. Brain, was there between the southeast corner of tract "A," as fixed by the first part of the survey made by Mr. Thomas and yourself, or made by Mr. Thomas in which you accompanied him, how much of a discrepancy was there between the southeast corner of tract "A," as fixed by that first part of the survey and that same corner as fixed by the second part of your survey? How many feet east and west did you have to proportion and how many feet north and south?

A. The discrepancy between the two lines there was not very much; I cannot remember it. I didn't take the notes, although I measured the chain. I remember it was about 150 feet one way that we missed that line; by the line we were running north



(Testimony of Elmer C. Brain.)

it was a little over 50 or 60 feet. I don't remember exactly. I did not take the notes although I did the chaining, [139] and called the numbers to him. I remember this line overshot the mark (indicating) about 150 feet, while this line (indicating) fell short of the mark about 60 feet.

Q. The discrepancy between the south boundary of tract "A" as fixed by the first portion of your survey and that line as fixed by the second portion of your survey was about 150 feet?

A. In an easterly direction; yes, sir.

Q. And the discrepancy between the eastern boundary of tract "A" as fixed by the first part of your survey and that line as fixed by the second part of your survey was about 50 feet. Is that correct? A. Yes, sir; that is correct.

Q. Now, Mr. Brain, as to the conversations between yourself and Mr. Allen in regard to buying these claims, did or did not your mother, who was acting for the Hunter Creek Mining & Milling Company, make Mr. Allen any offer for his ground covered by these claims?

A. After he set this figure; yes.

Q. But she did not before that time make him any offer?

A. I don't think she had ever seen him before in reference to this matter, before that time she met him in Mr. Rogers' office.

Q. At that time did Mr. Allen state to you that he thought the claims were on his ground or did he state

(Testimony of Elmer C. Brain.)

to you that he did not know whether the claims were on his ground?

A. Why, he maintained that he did not know that they were on that ground, yes, sir. [140]

Q. His proposition was to have the Hunter Creek Mining & Milling Company, or Mrs. Brain, its manager, pay him then \$5,000 for his claim? Is that correct—

A. Yes, sir.

Q. That was predicated—

A. (Interrupting.)—he did not maintain that they should pay him that; he maintained that he would take that for it; that he would not take any less for it than that; but he did not care whether it was Brain or the other fellow.

Q. But that was based on the theory that these claims were on his ground? A. Yes, sir.

Q. Did or did not he express any opinion as to whether or not those claims had any value as mining claims?

A. Why, at that time I never asked his opinion on that subject; that subject was not brought up.

Q. It was not brought up?

A. That is, as to his opinion as to whether the thing was a commercial proposition or a mineral proposition.

Q. But he gave you to understand that he did not know whether those claims were on his ground or not? A. Yes, sir.

Q. At the time that he proposed to you or to Mrs. Brain or to the Hunter Creek Mining & Milling Company to pay him this sum of \$5,000 for the ground



(Testimony of Elmer C. Brain.)

covered by those claims, at that time the ground was discussed between Mr. Allen, on the one hand, and your mother for the Hunter Creek Mining & Milling Company on the other, as being ground valuable for these [141] minerals, wasn't it?     A. Yes, sir.

Q. And Mr. Allen suggested the sum of \$5,000 on the theory that the claims had some mineral value, that is, that he supposed that you were going to work them as mining claims?     A. Yes, sir.

Q. But he himself expressed no opinion as to whether or not they had any mineral value?

A. We never asked his opinion on that.

Q. Exactly; and he expressed no opinion on that subject, Mr. Brain?

A. Yes, sir; there was no opinion expressed on that at that time, or before.

Q. What, if any, shipments of ore have ever been made, to your personal knowledge, Mr. Brain, from these claims which we are discussing?

A. Personally, I was away when that shipment was made. I know of the shipment being made to the Northport Smelter, purely for a test of the ore. It was some—I have since seen the returns from the smelter on that ore and, of course, I was shown just exactly where that ore came from.

Q. You yourself had no personal knowledge as to this shipment?     A. No; I was away.

Q. You don't know how many tons there were in this shipment, you have no personal knowledge, in reference to that?

A. I did not personally weigh it, but I have the



(Testimony of Elmer C. Brain.)

Northport Smelter's returns on it and their figures.  
[142]

Q. You did not see that ore yourself before it was shipped, Mr. Brain?     A. No, sir.

Q. You don't know how many tons there were in that shipment of your own personal knowledge?

A. No, as I did not make the shipment.

Q. And you have no personal knowledge, Mr. Brain, as to the value of that shipment?

A. Well, as much as anybody has; I just saw the returns.

Q. Well, you did not see the ore extracted from the mine yourself, Mr. Brain?     A. No.

Q. You did not see it transported from the mine to the railroad, Mr. Brain?     A. No, sir.

Q. You did not see it transported by the railroad to the Northport Smelter?     A. No.

Q. You did not see it treated when it got there?

A. No.

Q. Consequently, Mr. Brain, you have no personal knowledge as to whether or not there was any such shipment made or as to the value of that shipment?

A. No, sir.

Q. Have you any personal knowledge of any shipment made from the mine, Mr. Brain, into the Northport Smelter or to any other smelter?

A. Not of any ore commercially, no; only from assays sent [143] upon testing them.

Q. When was this shipment made, do you know, Mr. Brain, this shipment to the Northport Smelter?

A. It was during my last year at school; I forget

(Testimony of Elmer C. Brain.)

whether it was five or six—

Q. Five or six years ago?

A. In 1905 or '06—about four or five years ago, I guess.

Q. There never was, then, since you have known it, or known of the property, but one commercial shipment from the claims of the Hunter Creek Mining & Milling Company, to any smelter?

A. That is all that I know of; yes, sir.

Q. Referring again, Mr. Brain, to the matter of the survey made, you know of only one Government post being certainly located in that township and range; that is the post at the southwest corner of section 31, township 30 north, of range 38 east?

A. No; I know of two.

Q. Where was the other post then, Mr. Brain?

A. The other post was the quarter post of section 34, along the southern township line of this disputed township.

Q. It was this point here (indicating on exhibit)?

A. Yes, sir.

Q. That post, then, at the southwest quarter of the southeast quarter of section 34, in this township and range?     A. Yes, sir.

Q. Under which I have written the letter "X"?

A. Yes, sir.

Q. What means have you of knowing that that was a Government [144] corner, Mr. Brain?

A. That corner followed the description, as to the witness trees, of the field-notes, of the Government field-notes that we got from the surveyor's office at

(Testimony of Elmer C. Brain.)

Olympia to run this survey on.

Q. Did you positively identify the witness trees, Mr. Brain?     A. I did.

Q. You did?     A. Yes, sir.

Q. By what method?

A. Well, by seeing the tree to describe the description in these notes.

Q. Describe the tree.

A. There were two trees there; one was a fir about twelve or fourteen inches through, that was about 30 feet from the corner, southeast of that post that was placed there; and there was another witness tree about the same distance northeast of that post. Both of these trees were or had been blazed in the ordinary Government way, and was marked with a Government marker as the quarter post and the witness trees of such and such a corner which they are, marked "B. T.  $\frac{1}{4}$ " post bearing tree, such and such a post. That tree has the marking on it by the Government.

Q. Who did this work of identification, Mr. Brain; yourself or Mr. Thomas, the surveyor?

A. Why, both of us; we were working together.

Q. In reference to the trees?

A. I don't know; I had those notes with me in my pocket, [145] I know. I was carrying those notes; I was going on ahead and I had those notes.

Q. Had you ever had any experience in a survey of this kind prior to this occasion, Mr. Brain?

A. No, I never ran any township lines, seriously.



(Testimony of Elmer C. Brain.)

Q. Had you, or had you not, prior to this time, any experience in identifying witness trees?

A. No; previous to this work on this township, I had not.

Q. You cannot swear, then, positively, Mr. Brain, that those were Government witness trees?

A. They were marked with the usual military marking that all witness trees are marked with, that are claimed to be witness trees, identical with the same markings that the township corner had; but as to knowing absolutely that they were Government bearing trees I could not swear to that; no.

Q. Do you know whether or not you made the proper allowance for the deviation or variation of the needle there on that survey?

A. Yes, sir, I do. I know absolutely that we made the 22-30 deviation every time.

Q. Who determined this, yourself or Mr. Thomas, that that was the proper allowance?

A. Neither of us determined that; that was determined. That, I know, is the fact all through there, and that is put down. Well, it is proven up by the magnetic north and the true north.

Q. That may be true, but that country is full of magnetic iron ore, isn't it, all through that township and range?

A. Yes, sir; that country has a good deal of magnetic iron [146] there.

Q. Well, then, somebody, either yourself or Mr. Thomas, must have determined that that was the proper allowance to make for the variation of the needle there, didn't they?

(Testimony of Elmer C. Brain.)

A. No, you cannot make that; it was placed on our notes and the township map; we had that forwarded to go by from Olympia, which notes there, the Government notes, state to make that allowance of 22-30, that that would be the true north line.

Q. You were going, then, by the township notes. Where did you get the township notes, Mr. Brain?

A. From Olympia.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused.

### **Stipulation.**

It is hereby stipulated that the inclosed letter from W. S. Rugh, Secretary of The Northport Smelting & Refining Co., may be introduced in evidence with the same effect as though Mr. Rugh testified before the examiner, under oath, as to the contents of the letter.

(Letter admitted and marked "Plaintiff's Exhibit 2 Admitted.")

(Here the hearing was adjourned without day.)

[147]

Monday, March 6th, A. D. 1911.

Hearing resumed pursuant to notice; all parties present.

**[Testimony of Harry H. Schwartz, Jr., for Complainant.]**

HARRY H. SCHWARTZ, Jr., called as a witness on behalf of the complainant, after being first duly sworn to tell the truth, the whole truth, and nothing but the truth herein, testified as follows:

(Testimony of Harry H. Schwartz, Jr.)

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Schwartz, please state your name.

A. Harry H. Schwartz, Jr.

Q. What, if any, official position do you hold with the United States Government?

A. I am a timber cruiser for the General Land Office.

Q. How long have you occupied that position?

A. About steadily for the last three years; before that off and on for about three years.

Q. You have had, then, about six years' experience in cruising timber.

A. Yes, sir, six years' experience. I cruised also for a couple of years before I worked for the Government.

Q. That is about eight years in all, then?

A. Yes, sir.

Q. What is your age?      A. Twenty-four.

Q. And your residence is Portland, Oregon?

A. Headquarters at Portland, Oregon. [148]

Q. And you are in the field division?

A. Yes, sir.

Q. I will ask you, Mr. Schwartz, if you have made a cruise of the timber upon the tract of land described as the northwest quarter of section 28, township 30 north of range 30 E., W. M., being the land patented by the Federal Government to the defendant in this action?      A. Yes, sir.

Q. When did you make that examination of the property, Mr. Schwartz?



(Testimony of Harry H. Schwartz, Jr.)

A. On the 5th of this month.

Q. And in company with whom?

A. With Special Agent Davey.

Q. That was yesterday? A. Yes, sir.

Q. I wish you would state what buildings, if any, you found on that property there.

A. Why, there was several buildings upon that land, I think there was seven or eight.

Q. What were they, generally speaking?

A. Well, they were all grouped together there around, and I judge them to be mining buildings for the reason that they were grouped together around a tunnel opening there.

Q. Did you find a tunnel opening there?

A. Yes, sir.

Q. Did you go in the tunnel?

A. Why, I went into the tunnel about four feet myself. [149]

Q. And Mr. Davey?

A. Yes, sir, inside the mouth of it.

Q. Did you find more than one tunnel on the property? A. One is all the tunnels that I saw.

Q. Now, you made a cruise of the timber on that property, did you? A. Yes, sir.

Q. Now, taking up the northwest quarter of that tract, state what timber you found there.

A. That is the whole tract?

Q. No, just the northwest quarter of the northwest quarter of that section 28.

A. Yes, sir, the northwest quarter of that section 28, I estimated to be 48,000 feet, of which forty per

(Testimony of Harry H. Schwartz, Jr.)

cent of it is red fir, and twenty per cent was balsam, and twenty per cent tamarack and ten per cent scrubby Jack pine.

Q. Now, taking up the northwest quarter of the northwest quarter did you make figures on that, if so, give them in detail, please.

A. Yes, sir. Figuring on that percentage, that would make 19,200 feet of red fir, 14,400 feet of balsam, 9,600 feet of tamarack and 4,800 feet of scrubby Jack pine.

Q. Now, take the southwest quarter of that section.

A. The southwest quarter, the percentage was about the same, there was 32,000 feet going about 12,800 feet of red fir, 9,600 feet of balsam, 6,400 feet of tamarack, and 3,200 feet of scrubby Jack pine.  
[150]

Q. Now, take the northeast quarter of the tract.

A. On the northeast quarter of the tract I estimated to be 30,000 feet of timber, making 12,000 feet of that tamarack and 12,000 feet of red fir and 6,000 of the balsam.

Q. Now, take the southeast quarter.

A. In the southeast of the northwest there was 36,000 feet, making, according to the same percentage, 14,400 feet of tamarack, 14,400 feet of red fir, and 7,200 feet of balsam.

Q. Now, Mr. Schwartz, are you familiar with the values of timber, standing timber?      A. Yes, sir.

Q. What would you say as to the value of the red fir there per thousand feet?

(Testimony of Harry H. Schwartz, Jr.)

A. The red fir there would be about fifty cents a thousand.

Q. And the tamarack would be about what?

A. The tamarack would be worth about fifty cents a thousand.

Q. And the scrubby pine?

A. That scrubby pine can be bought for twenty-five cents a thousand.

Q. And is worth there about twenty-five cents?

A. Yes, sir.

Q. And the balsam?

A. The balsam in that tract is pretty badly soured; it would be worth probably about ten cents a thousand, if it is worth anything.

Q. Have you made a computation—assuming that the figures [151] that you have given here as to the number of feet of the various timber there to be correct, have you made a calculation so that you can testify as to the total value of that timber?

A. The total value of that timber, that stumpage in the northwest quarter of the northwest quarter would be \$17.04; and upon the southwest of the northwest it would be \$11.36; and upon the northeast of the northwest quarter, it would be \$12.60 and upon the southeast of the northwest quarter it would be \$15.12.

Q. Making a total of about \$56.10?

A. I didn't figure up the total.

Mr. MACDONALD.—That is all.



(Testimony of Harry H. Schwartz, Jr.)

Cross-examination

(By Mr. MOSBY.)

Q. How old did you say you are, Mr. Schwartz?

A. Twentyfour.

Q. Where have you done your work in the service of the Interior Department?

A. I worked for the Interior Department in Idaho, Washington, Oregon, California, Colorado and Montana.

Q. How long have you been in the service of the Interior Department?

A. About three years, steadily; that is, working for them right along every day, you might say. Before that I did special work, what they call special work for them, a job at a time. [152]

Q. From what part of the country are you, Mr. Schwartz? A. What is it?

Q. What is your native state?

A. I was born in Chattanooga, Tennessee, but I don't ever remember that part of the country. I was brought up in the western states, I guess, when I was about ten or twelve years old.

Q. Where is your home at present, sir?

A. Portland, Oregon.

Q. How was it you happened to go up to examine this tract of land, Mr. Schwartz?

A. I was detailed by the Acting Chief of the Field Division at Portland, Oregon.

Q. When?

A. I was detailed on the afternoon or the forenoon of the—I left and got into here on the forenoon of

(Testimony of Harry H. Schwartz, Jr.)

the 3d, I believe.

Q. Here is a calendar up here (indicating).

A. Last Friday was the 3d. I was detailed on the forenoon of the 3d.

Q. Of the 3d of this month? A. Yes, sir.

Q. What is the gross number of feet of standing timber on that northwest quarter of section 28 in that township and range, Mr. Schwartz, the gross number of feet? A. That is classified?

Q. All the timber.

A. All the timber on the entire tract? [153]

Q. Yes, sir.

A. A hundred and forty-six thousand.

Q. A hundred and forty-six thousand feet?

A. Yes, sir.

Q. Do you mean to say that that is all the timber on the entire quarter section, Mr. Schwartz?

A. Yes, sir.

Q. Well, did you say that you were on the property on the 5th of this month, that is, yesterday?

A. Yesterday.

Q. How long did you remain on the property?

A. Why, I should think that I was on the property about four or five hours.

Q. Did you go all over the property, the one hundred and sixty acres in that time?

A. I was in the timber, in the timber, yes, sir.

Q. Did you go around the lines bounding that tract, that quarter section?

A. No, sir, I did not; I did not go around the lines.

Q. Well, how do you know, Mr. Schwartz, that you

(Testimony of Harry H. Schwartz, Jr.)

were on that quarter section?

A. Well, I was given what was said to be the center of the section in there first, where it was placed or said to be placed by some former engineer. That is as much as I know about the location of that line.

Q. That is, you based your measurement as to where you were from the fact that you had been pointed out or told where the center of that section 28 was? [154]

A. No, sir, the center of that quarter.

Q. Of that quarter?

A. Of the quarter of the section.

Q. What did you find there to determine it was the center?

A. I took a point about 550 feet from those buildings, south and just a little east, on the hill there.

Q. And you described, after a fashion, a square from that point?

A. Well, I horseshoed it out, horseshoed the timber out. I did not attempt to run the lines around it, around the quarter section.

Q. Your estimate, then, is very inaccurate, from what you state?

A. No, I consider the estimate to be, if anything, above the amount of timber that is on there. I tried to get a pretty good estimate of it.

Q. Well, what was it you said you found to determine the center of this quarter section?

A. Why, it was just the approximate point there, south of those buildings.



(Testimony of Harry H. Schwartz, Jr.)

Q. Well, did you use any chain or tape in your measurement?

A. No, sir; I hardly ever do in estimating timber in a small tract in that way.

Q. You did not use any surveying instruments there? A. I used a compass.

Q. Just a compass? A. Yes, sir. [155]

Q. A pocket compass?

A. An engineer's compass with sights on it.

Q. How much timber is on the southwest quarter of that section, Mr. Schwartz?

A. The southwest quarter of that section?

Q. Yes, sir.

A. I didn't estimate the timber on the southwest quarter of the section.

Q. I thought that you did. A. No, sir.

Mr. MACDONALD.—He didn't go into the southwest quarter of the section, he just divided it up into forty acre tracts there.

Q. I will ask you for what purpose is that timber valuable, if it has any value, Mr. Schwartz?

A. Why, yes, sir.

Q. I say, for what purpose is it valuable, if it has any value?

A. Saw timber; you could cut saw timber out of it and that red fir is good mining timber.

Q. Good mining timber? A. The red fir is.

Q. Well, for fuel purposes, has it any value?

A. Oh, yes.

Q. Well, what would be your estimate as to the commercial value of that timber, the monetary value

(Testimony of Harry H. Schwartz, Jr.)

of that timber for all purposes on that quarter section?

A. Well, the way we arrive at that, on a proposition like [156] that, is this, that it is so far from the market—

Q. I don't care, at this time, for the method by which you arrive at it. I simply want to know if you made the computation, just what the total value of the timber on that entire quarter section would be in dollars and cents.

A. I can add up my figures here, \$56.12.

Q. A thousand?

A. No, sir; that is all the timber on there.

Q. That is all it is worth?

A. That is all I figure it is worth. It is not a timber proposition.

Q. What is that?

A. I say, it is not a timber proposition out there at this time.

Q. Well, is that land cleared there, or isn't it clear, Mr. Schwartz?

A. No, it is not cleared—you mean the timber taken off?

Q. Yes, sir.      A. Oh, no.

Q. It is not cleared?      A. No, sir.

Q. Well, what is the character of the surface of the ground there?

A. Well, I don't know what the character of the surface of the ground is.

Q. I asked you whether you know or not. That

(Testimony of Harry H. Schwartz, Jr.)

is, is all of it timbered, or is some of it free from timber? [157]

A. Why, there is some of it that is free from timber in there.

Q. Does it show that there has been timber there that has been taken off or not?

A. Well, I couldn't tell. There might have been some timber taken off of there. The snow was pretty deep. It shows, though, there couldn't have been but very little timber taken off under there. There is no tops down around, unless it was taken off seven or eight years ago, so as to allow the tops to not show up in the bare places.

Q. Do you mean to say, then, Mr. Schwartz, that there isn't more than \$56 worth of timber on that quarter section of land; is that it?

A. I wouldn't think there was; no, sir.

Q. You wouldn't pay the Government, then, \$400 for the timber on that land?

A. I sure wouldn't. I wouldn't pay them one hundred dollars.

Q. Now, Mr. Schwartz, will you describe on this map (Plaintiff's Exhibit 1) the point from which you commenced?

Mr. MACDONALD.—This part here in black lines, marked tract "A," is designated in there as the northwest quarter of section 28.

Q. Did you examine this, Mr. Schwartz?

A. I looked over that with Mr. Davey.

Q. Are you able to identify this as being a correct reproduction of the location of those tunnels and



(Testimony of Harry H. Schwartz, Jr.)

buildings and so on and so forth?

A. Yes, sir. [158]

Q. Now, Mr. Schwartz, I wish you would refer to that map, Plaintiff's Exhibit 1, and state how you located the initial point from which you began your cruising of that quarter section.

A. We went south of those buildings there for the center point.

Q. To the center point? A. Yes, sir.

Q. To the center point of what?

A. Of that section 28.

Q. Of that section 28? A. Yes, sir.

Q. What did you discover there to determine that that was the center point of section 28?

A. Nothing at all. I just simply took an approximate point south of there about 500 feet.

Q. What had you to guide you with reference to that being the center point?

A. Simply that I took an engineer's compass and run in south there about 500 feet.

Q. In using that compass what, if any, allowance did you make for the variation or deviation of the needle there?

A. We made an allowance in there for the variation of the needle about between nineteen and twenty.

Q. Between nineteen and twenty? A. Yes, sir.

Q. Between nineteen and twenty what? [159]

A. Degrees.

Q. Did you, or did you not, make any allowance for the fact that that is a highly mineralized country and contains considerable magnetic iron ore?

(Testimony of Harry H. Schwartz, Jr.)

A. No, sir.

Q. Was there any snow on the ground when you were there, Mr. Schwartz? A. Yes, sir.

Q. Was the ground covered with snow?

A. Yes, sir.

Q. How deep was it?

A. I think that snow was probably over three feet deep; maybe three and a half.

Q. There was nothing, then, by which you could possibly determine that you had reached the center of that section 28?

A. No, I could not say positively that I reached the center of that section 28.

Q. You might have been two hundred and fifty yards away from it?

A. For all I know; I was simply told that was approximately the center of the section from another surveyor's notes.

Q. You might have been 500 feet from the center of that section? A. Yes, sir, I might have been.

Q. You might have been as much as a thousand feet from it?

A. I don't know a thing about it, for the simple reason I [160] took another surveyor's notes for it and his word for it, simply what he said about that, that it was 500 feet south from those buildings. I took his word for it. I did not make any survey there from any section corner in the vicinity, and the only thing I have for it was his word for it and that is the only thing I have for it. I don't know whether it may have been one thing or it may have been an-

(Testimony of Harry H. Schwartz, Jr.)

other, but simply that I took his word for it and his notes.

Q. Have you got the notes that he gave you?

A. I had his affidavit at the time that he made.

Q. Have you got that affidavit?

A. Mr. Davey has it now, I believe.

Q. Over how much ground are those improvements in the way of buildings extended?

A. I didn't make an estimate in there; but I should think those improvements extended over, to my recollection of it, about an acre and a half to two acres, the buildings themselves.

Q. An acre and a half to two acres?

A. An acre and a half to two acres.

Mr. MOSBY.—Let the record show that at this time we object to any testimony whatever on the part of the witness, because he has not shown himself to be qualified and his testimony is based on hearsay and based on an affidavit, the maker of which the defendants have had no opportunity to cross-examine **whatever; and at this time the Court is moved to strike out all the testimony that has been given by the witness.** [161]

Q. Now, from the initial point of your cruise, Mr. Schwartz, in what direction did you first go?

A. From the initial point I made a horseshoe.

Q. Now, please describe in what method you made that horseshoe.

A. Made the horseshoe from the center in there to the west, north and east.

Q. To the west, north and east you made a horse-



(Testimony of Harry H. Schwartz, Jr.)

shoe? A. Horseshoed it out.

Q. Did you make any horseshoe to the south?

A. The horseshoe took it all in.

Q. The horseshoe took it all in?

A. The horseshoe took it all in.

Q. Rather a circle, I guess?

A. Yes, sir, a horseshoe.

Q. By a horseshoe you mean you circled?

A. Yes, sir, a sort of a circle.

Q. What were the radii of that circle, Mr. Schwartz? A. The radii of the circle?

Q. The radius. A. Half the diameter.

Q. Half the diameter; yes, sir.

A. Oh, probably about a quarter of a mile.

Q. How much?

A. A quarter of a mile, or a little less, but that circle, you understand, that horseshoe or circle, whichever you call it, does not have as a center the center of 28.

Q. What does it have as a center, then, Mr. Schwartz? [162]

A. You might say it starts—it is not a circle, in fact, it starts on the center and goes west, the center of 28, the southeast corner of the line, and goes west and turns north and then turns back east.

Q. And then what direction does it go from the east? A. It ends up there.

Q. It ends up there? A. Yes, sir.

Q. Well, then, all the cruising that you did was within that horseshoe, was it?

A. Yes, sir; that is the system, in cruising the

(Testimony of Harry H. Schwartz, Jr.)

whole timber; that is recognized as a system of cruising, and a good one. It is pretty close, I think.

Q. Who accompanied you on this cruise, Mr. Schwartz?

A. I was alone part of the time and part of the time Mr. Davey was with me and part of the time I believe his name was Taylor, a man that said he knew that property up there pretty well who went with us. I guess his name was William Taylor. They called him Bill.

Q. Did you make any examination of the entries on the other part of that section, Mr. Schwartz?

A. Only as I went through there, that is, going up to the land and back. I never made any examination of any other land in there but that, except as I took a general look at it.

Q. What is the general character of that country with reference to being timbered or not, those sections in that immediate vicinity? [163]

A. Well, there is timber on them. Of course, it is nothing extra, but there is timber on them.

Q. Would you call it a timber country or not?

A. Yes, sir, it is a timber country around there for four or five miles.

Q. Now, coming back, Mr. Schwartz, to the matter of the initial point from which you started your cruise, I understood you to say that you took as the initial point the center of section 28.

A. A point about 500 feet south of those buildings, and a little to the east.

Q. And then you ran a horseshoe how far west?

(Testimony of Harry H. Schwartz, Jr.)

A. I went west, the horseshoe going west there along between a quarter and a half, about, oh, about three-eighths of a mile, in through there where you can see across the country; and took and cruised it back up north and then came in west again.

Q. Came in west again?

A. Came in east again.

Q. Mr. Schwartz, which forties of that quarter section are the most heavily timbered, would you say?

A. Why, the heaviest timber in there, that is, the best timber, is on the northwest of the northwest.

Q. On the what?

A. On the northwest of the northwest. There is considerable timber on the southwest of the northwest; considerable of it dead, though. [164]

Q. You spoke of going east; when you started east did you ultimately reach the point of beginning?

A. Starting east?

Q. Yes, sir, and went up this way (indicating).

A. West.

Q. West and then north?

A. North, and then back east.

Q. North and then back east. Did you then come back to the point of beginning?

A. I came back to these buildings.

Q. Did you locate in any way the center of tract "A" as is shown in Plaintiff's Exhibit 1?

A. No.

Q. The center of this quarter section.

A. I could say about where it was in my estimation.



(Testimony of Harry H. Schwartz, Jr.)

Q. How is that?

A. I could say about where it was in my estimation. I didn't locate it. I didn't pace it out or measure it with a chain.

Q. Referring to Defendant's Exhibit No. 1, Mr. Schwartz, do you recognize that as being a photograph of any portion of the locality which you visited in making this cruise?

A. Yes, sir; that is probably the tunnel. That was pretty heavily covered with snow when I was in there. Of course, it looks considerably different now than when this picture was taken. It looked like the dump of that tunnel would there.

Q. Well, that looks like a timbered country, doesn't it, [165] Mr. Schwartz, in that picture?

A. Yes, sir, but pretty poor timber.

Q. It is worse for agricultural land than it is for timber, you would say, wouldn't you?

A. It is not agricultural land; it is too rough, and it is very rocky up there, too, on the ridge.

Q. I will ask you, Mr. Schwartz, if you recognize this photograph marked Defendants' Exhibit 2, as being a photograph of anything like what you saw in that locality upon your cruise?

A. Yes, sir, that is what appears to be those mining buildings up there, evidently mining buildings being clustered around this tunnel.

Q. Well, that looks like a timbered country, Mr. Schwartz, don't it?

A. Yes, sir, it is timbered pretty well in that last

(Testimony of Harry H. Schwartz, Jr.)

one, but you can't tell much about the timber in that photograph.

Q. I will ask you in your method of arriving at this estimate of the amount, in reference to your method of arriving at this estimate of the timber on the ground, about how many trees did you estimate there were on that quarter section?

A. I didn't estimate as to how many trees there were; in fact, I paid but little attention to how many trees there were there, when I run that horseshoe. About three acres out of the best of the timber was in there, and I estimated it on that.

Q. Yes, sir. [166]

A. I took about three acres of the best of the timber in there on those three forties and estimated it on that horseshoe.

Q. You took about three acres out of the three forties and estimated it on that?

A. Out of the best of the timber in there, that was not dead.

Q. Then out of that entire 160 acres you estimated the timber only on about twelve acres?

A. Yes, sir. That is a whole lot in estimating timber.

Q. That is all that you estimated it on, that twelve acres in 160? A. About twelve acres.

Q. You don't know, then, in reference to the other 148 acres, as to whether it is timber or not?

A. Certainly I do; I saw it all.

Q. I am asking you now, how many trees you estimated there would be on the balance of it?



(Testimony of Harry H. Schwartz, Jr.)

A. I did not estimate it on the trees. I simply took what would be in the trees there, the amount of it and saw the rest of it and saw I was in the best of it, and took this cruise as the basis to work on.

Q. Did you go over the southwest of it?

A. I simply went around through this horseshoe.

Q. You did not go over the balance of the 148 acres at all? A. No; it is not necessary—

Q. I asked whether or not you went. ' [167]

A. No, I did not go over every foot of it.

Q. All you went on was the twelve acres you mentioned? A. Around that horseshoe.

Q. Three acres on each of the forty acres, comprising the entire acreage of tract "A"? A. Yes, sir.

Q. Did you estimate the number of trees on the three acres on each of the tracts of forty acres that you took?

A. I did not estimate it into trees at all. I estimated it in feet.

Q. Well, I assume that the feet have to be measured on the estimate of the number of trees?

A. It does not, though.

Q. Well, to get at an accurate estimate I should think that you would.

A. No, it is not so considered. In fact, a cruise don't call for it. It calls for the number of feet. It don't show the number of trees in the specifications.

Q. Well, that 19,200 feet, you don't mean to say that one tree had that, in reference to the northwest quarter of that northwest quarter that had, you say, 19,200 feet of red fir.



(Testimony of Harry H. Schwartz, Jr.)

A. That is about the percentage of the total I thought was on there.

Q. Now, as a matter of fact, you estimated only three acres of that entire forty and the other thirty-seven acres you didn't go on?

A. I ran a horseshoe on there. [168]

Q. You didn't run out that 37 acres at all?

A. No, sir, but I simply want it understood that those three acres was not slapped down and picked up any place, to simply go through it, those three acres, to sit down and take three acres off. If you are estimating timber for a fellow you pick the best of it and you can run that out and use that for an estimate, as a basis, and get it up without going through it. I took an average of it.

Q. That 19,200 feet of red fir there, do you mean to say it was in one tree? A. No, sir.

Q. How many trees was it in? A. The red fir?

Q. Yes, sir.

A. I didn't figure out the number of trees.

Q. That is what I want to find out.

A. I said so.

Q. I want to find out about that. There was 19,200 feet of red fir, you say there? A. Yes, sir.

Q. That red fir was not in the one tree, you say?

A. No, sir.

Q. Was it in two trees?

A. I said I didn't estimate the number of trees. I am not going to tell you it was in two trees or fifty. You might as well put down two thousand.

(Testimony of Harry H. Schwartz, Jr.)

Q. You say you didn't estimate the number of trees? [169]

A. I come to one tree and look at it and estimate it will cut about so much. It is not necessary to put down the number of trees you got—

Q. But you—

Mr. MACDONALD.—Let him finish his answer.

A. (Continued.)—you can get four or five little trees around in a bunch up there, but you don't anywhere set those down, the four or five little trees, you will say those four or five trees will cut four hundred and eighty feet and you put that down on a piece of paper and figure that up. That don't necessarily show the number of trees. If you want what they call a guaranteed estimate, you could take the number of trees and dead tops, and, if you are estimating the balsam, the number of trees that appear to be sour and so forth. It is not necessary to take the number of trees.

Q. Well, Mr. Schwartz, it is a pretty plain proposition to me that the 19,200 feet you estimated there must have been in some trees? A. Yes, sir.

Q. And it is either in one tree or it must have been in more than one tree. If it is more than one tree, I want to know how many trees you estimated those number of feet were contained in. It is a very simple question.

A. And I answered that and I said I did not estimate the number of trees. You are asking for the exact number of trees.

Q. I am not asking for the exact number but the

(Testimony of Harry H. Schwartz, Jr.)

estimated [170] number.

A. You want my estimate of it, now?

Q. That is what I want, exactly.

A. That is different. I should judge in that locality, there, it would average about 280 feet to the tree in red fir.

Q. Two hundred and eighty feet to the tree?

A. Yes, sir, about that; it might not go that much.

Q. That would be about 65 trees, then, of red fir?

A. About, just about.

Q. Sir? A. Just about.

Q. Now, of those 65 trees, how many red fir trees do you remember that you saw on those three acres that you were cruising? A. I don't remember.

Q. You don't remember?

A. In fact, I didn't count them.

Q. Did you see as many as one?

A. Yes, sir, I saw more than one.

Q. Did you see as many as two?

A. I don't remember. I saw more than two, and more than three and more than four. I did not estimate the number of trees on it.

Q. Did you see as many as five?

A. I saw more than five.

Q. Did you see as many as six?

A. I don't know how many I did see on there; in fact, I didn't estimate the number of them. [171]

Q. I want to see if, by refreshing your recollection, you cannot remember how many you saw.

A. That is on the three acres?

Q. On the three acres.



(Testimony of Harry H. Schwartz, Jr.)

A. No, sir, I did not count them.

Q. Did you see as many, probably, as three red fir trees on that three acres that you cruised?

A. I am not talking about how many I did see, but I am talking about what it averaged.

Q. I understood you to say that you saw as many as four or five.

A. Well, I don't know whether I did or not.

Q. Well, that is what I want to be certain about. That is my understanding of what you said.

A. I probably did.

Q. You probably saw as many as five?

A. Yes, sir. Some of them were two or three inches in diameter, little scrubby stuff with no value to them.

Mr. MACDONALD.—I didn't catch that.

A. I saw little stuff that hasn't any value to them. They are not in the estimate at all.

Q. Well, did you see any other kind of timber there excepting the red fir or tamarack or scrubby pine and the balsam?

A. I didn't notice any other timber, excepting red fir, tamarack, pine and balsam. No, I didn't notice any other timber there.

Q. Did you notice any yellow pine there at all?  
[172]

A. Well, there was some stuff, scrubby yellow pine; it might have been called yellow pine by some people, but it was simply black jack, little scrubby black jack.

Q. You made no estimate at all, then, of the yellow

(Testimony of Harry H. Schwartz, Jr.)

pine on the tracts that you cruised?

A. No, excepting I would come to one of those scrubby trees—some people call it bull pine, too,—and I would put it in. I would hardly call it yellow pine.

Q. Did you notice any spruce?

A. Some balsam in there.

Q. Did you notice any bull pine?

A. Well, that little stuff I was telling you about, that little scrubby stuff, some people call it bull pine. As a matter of fact, the real bull pine is quite large trees, as a usual thing.

Q. Now, I understood you to say that you did not count the trees on any of this ground that you cruised? A. No.

Q. To make an accurate estimate of the timber on any piece of land, Mr. Schwartz, it is necessary that you should count the trees, isn't it, to make a guaranteed estimate?

A. No, it is not necessary that you should count the number of trees to make a good estimate, for this reason: You can take what is in the tree or what is in three or four little trees, and set them all down separately, and you can get your result the same. As a matter of fact, the number of trees would be just a little additional information and not have any [173] bearing on the cruise itself, as to the count of the timber, but you would get a little additional information. If you wanted to determine the log timber, how many log timber it has, it is a good idea to count your trees, and take them into consideration.

(Testimony of Harry H. Schwartz, Jr.)

But even at that you can get the log in your timber and report on how many log timber there is without showing the exact number of trees or estimating the number of trees.

Q. Well, some trees are large and some are small?

A. Yes, sir.

Q. And a little tree does not contain as many feet of lumber as a big tree?      A. No, sir.

Q. And if you don't count the number of trees it is an estimate, I presume, as to the number of timber there should be on the land?

A. The estimate of timber is always presumed.

Q. An estimate of timber is always presumed?

A. And the only way to determine the exact amount of timber is to take it as it comes from the saw, the exact number. A timber cruise is a timber estimation, and the estimation is always an estimate.

Q. Then, the estimations that you have given us here, Mr. Schwartz, are by no means accurate,—they are mere presumptions.

A. I don't say they are by any means accurate, but if they are not close to accurate our cruise would be worthless.

Q. Are they such as you would care to bet twenty dollars [174] on that they are right?

A. I wouldn't say they were exactly right.

Q. I am talking about approximately right.

A. I would say that there isn't any more merchantable timber on there.



(Testimony of Harry H. Schwartz, Jr.)

Q. What do you mean by merchantable timber, Mr. Schwartz?

A. Well, there is a lot of rotten stuff on there, and there is a lot of little stuff in there, scrubby, you know, and that you couldn't cut a log out of it, and there is a lot of stuff two and three inches in diameter.

Q. Well, now, these estimates you have given are in reference to merchantable timber?

A. With reference to the merchantable timber.

Q. And by that you mean log timber?

A. Well, that is the only merchantable timber on there. Merchantable timber don't always mean log timber. You can cut it into firewood, and merchantable timber don't mean merchantable timber where you can cut it into stulls, mining props, or fence rails.

Q. Well, sir, you spoke of merchantable timber. You mean you have gotten down here, then, as an approximate term, all of the timber on that tract "A," on Plaintiff's Exhibit 1, for all kinds of commercial purposes, fuel or anything else?

A. Yes, sir; I should say that was about right. Of course, when you say fuel, now, if you say fuel, there might be some dead-down rotten stuff and yet be pretty solid that lay under the snow and you can cut that into fuel.

Q. You didn't see that at all? [175]

A. Of course not.

Q. You don't know how much was under it?

A. There isn't very much under it or you could see signs of it in the snow. There was some down there.

(Testimony of Harry H. Schwartz, Jr.)

Q. Now, Mr. Schwartz, coming back again to tract "A," how far northwest of the center of tract "A" did you go?     A. North what?

Q. This is tract "A" (indicating on Exhibit 1). How far northwest of the center of that tract did you go?

A. Oh, I got in there about 300 or 350 yards.

Q. Three hundred and fifty yards north of the center of tract "A"?

A. I got in about that far; maybe 300.

Q. Not further than that?

A. I wouldn't think so.

Q. What were you doing on this survey, Mr. *Schultz*, with reference to taking notes, were you taking any notes?

A. I was jotting notes down every once in a while. I wasn't making a survey in there.

Q. Cruising, I mean; surveying the timber. Where were these three acres? Point out, if you will, on tract "A," the location of the three acres in each of the quarter sections comprising tract "A," the three acres upon which you made your respective estimates of the timber on those forty acre tracts.

A. The three acres?

Q. Yes. Do you understand?

A. The three acres, you mean,—each one of those three [176] acres?

Q. I understood you to say that you had taken three acres from this forty and this forty and this forty and this forty (indicating), all four of them, is that right?

(Testimony of Harry H. Schwartz, Jr.)

A. Yes, sir, right around in about here (indicating). Just as I say, I went off in around in this direction, that is, northwest—that would be north of west and then up through there (indicating) and up on top of that ridge and then came down.

Q. Were those three acres, or the twelve acres altogether there, were they— A. I—

Q. Were they taken at or near the center of tract “A”?

A. I took them all along this horseshoe here.

Q. All along that horseshoe?

A. Yes, sir. (Witness marks on Plaintiff’s Exhibit 1.)

Mr. MACDONALD.—The witness has marked in tract “A,” in red ink, a line which approximately shows the “horseshoe” as testified to by him, as being the course which he took in making his estimate of the amount of timber on the tract.

A. Yes, sir.

Q. Did, or did not, you make any estimate, Mr. Schwartz, from the northern end of the horseshoe to the southern end of the horseshoe? A. No, sir.

Q. You did not?

A. No, sir; I walked along pretty close to that line. I didn’t make an estimate on that, but I noticed the timber [177] there.

Q. Did you go beyond the boundary of that line as indicated, that red line shown on tract “A”?

A. Beyond, which way?

Q. Beyond either southwest or northeast of it?

A. That line may be inaccurate there. I may



(Testimony of Harry H. Schwartz, Jr.)

have gone off from that line. That line may go over here a little further (indicating).

Q. That is west?      A. Yes, sir.

Q. How much, if any, further did you go beyond that line to the west, Mr. Schwartz?

A. Oh, I should not think it would be over fifty yards.

Q. Fifty yards?      A. Yes, sir.

Q. You didn't go beyond that line on the south, Mr. Schwartz, at all?      A. No.

Q. You didn't go beyond that line on the north, Mr. Schwartz, at all?

A. No; except it was approximately the way I went around through there, that line might—ought to be up here probably 100 yards. It might—ought to be up probably 50 yards. I think that would catch it all right (indicating).

Q. Well, you probably did not go, if you did go at all beyond, more than fifty yards away from that line at any point, I should say? [178]

A. I should not think so.

Q. You did not go east of that line, or east of the eastern boundary of tract "A" at all?

A. No; I did not make an estimation in the east there.

Q. Now, Mr. Schwartz, will you indicate on that map where each of these respective three acre tracts which you used in your cruise, in making the estimate, where each of those three-acre tracts was located?      A. Along that red line.

Q. Along that red line?      A. Yes, sir.

(Testimony of Harry H. Schwartz, Jr.)

Q. Do you mean, Mr. Schwartz, that the twelve acres that you took was simply twelve acres along that red line?

A. Yes, sir, down near, as I went around through there (indicating).

Q. In going along the western boundary on the west shown on the red line, did you see anything of a ridge on tract "A," Mr. Schwartz?

A. Yes, sir, there are several ridges in through there.

Q. Did you go up to the top of any of those ridges?

A. I was on the top of a ridge there.

Q. Did you see any yellow pine on top of those ridges? A. I saw this scrubby stuff there.

Q. Did you see any yellow pine a foot or two in diameter? A. No, sir.

Q. You did not? A. No, sir. [179]

Q. In estimating, Mr. Schwartz, this merchantable timber, please state what size trees you used in making the estimate. A. What sized trees?

Q. What sized trees? A. Did I use?

Q. Yes, sir.

A. I used any trees on the ground.

Q. You took them on the ground?

A. I took the trees that were on the ground, of course.

Q. I want to know what the size of them was.

A. The size on the ground?

Q. Yes, sir.

A. Oh, those trees in there run all the way from, I should judge, twelve inches in diameter to two feet,

(Testimony of Harry H. Schwartz, Jr.)

some of them. A few of them, I believe some of the fir, some were red fir.

Q. Twelve inches to two feet? A. Yes, sir.

Q. You took no timber below twelve inches?

A. I probably did. I probably seen trees in there below that, but that was my estimate of it. I took everything that was there.

Q. What I want to find out is whether or not in your estimate there, if you were generally taking trees below or above twelve inches in diameter.

A. I took all the trees on there that I thought would cut up into either firewood or make a stull or make saw timber. That little stuff, that little scrubby stuff in there, that is no good. [180]

Q. Well, what would you call little scrubby stuff—how thick would that be in diameter?

A. It don't necessarily need to be any special diameter. If you have got a tree that is, say, twelve inches, with a little swelled butt that goes up about four or five feet, and begins to branch right in within ten feet, and it has grown to be ten inches thick, so that you couldn't get a top out of it, what would you do with it? Nothing.

Q. You couldn't use it?

A. You could probably cut one length of stovewood out of it, but after you trim it up there isn't anybody would scale it up for stovewood.

Q. How much of that kind did you find?

A. There is lots of them in there, but not very many that size, but lots of them about six or eight inches, not good stumpage.



(Testimony of Harry H. Schwartz, Jr.)

Q. Trees six to eight inches you did not estimate?

A. They would not make into lumber at all. If they was eight inches on the top I took them into consideration.

Q. What I am getting at is, in your estimate. I figured a little while ago there was about 65 trees then on the northwest quarter of the quarter section?

A. Yes, sir.

Q. And you figured that there would be five or six trees, that is, approximately—

A. Oh, some of those. I don't know how many trees of that—

Q. (Continued.)—five or six trees were red fir we were [181] talking about then?

A. On what?

Q. On the three acres that you used as a criterion of the entire number, of the amount of timber on the northwest forty of that tract.

A. Well, that is all those trees, that is that scrubby stuff, too, I told you that before.

Q. Well, now, all this scrubby stuff, I understood you before, to say were trees that was twelve inches to two feet?

A. Some of those small butted red firs in there would be two feet on the stump.

Q. Did you consider any red fir of less diameter than twelve inches in the estimate?

A. Yes, sir; it depends on the character of the tree, whether it went up, and you could cut a log out of it, whether it would pay to cut into wood. You take a tree that starts out with a whole lot of branches

(Testimony of Harry H. Schwartz, Jr.)

on it, you can't cut those branches off at a profit, especially when it is a little scrubby tree.

Q. How many trees of that kind did you estimate on the northwest forty of that tract "A"?

A. I didn't estimate no trees of that kind.

Q. How many do you remember seeing?

A. Oh, I don't know; I didn't make even a mental note of how many there were.

Q. You must have made some because there are 19,200 feet here that were calculated, that you have estimated, and we have just made a hasty calculation that to that number of [182] feet there must have been about 280 feet to the tree, which was 65 trees?

A. You just got through talking about little scrubby stuff that would not pay to cut up and which is not really called timber in a country where there is any timber, and that timber I was telling you about I didn't make a note of the number of that kind of trees.

Q. You didn't take any note?

A. Of that kind of trees, and you switched off and began to talk about the merchantable timber.

Q. There might have been a large quantity of scrubby trees there of which you took no note, whatever?

A. There wasn't a very large quantity, because the timber was not heavy enough to admit of a large quantity.

Q. Well, a considerable quantity, then?

A. Yes, sir; there was considerable of that scrubby stuff on there.



(Testimony of Harry H. Schwartz, Jr.)

Q. If a tree was eight inches in diameter and fifty feet high, would you consider that scrubby or not?

A. What is your diameter?

Q. I say eight inches in diameter and fifty feet high. A. You mean at the butt?

Q. Yes; eight inches in diameter at the butt and fifty feet high, would you consider that scrubby or not?

A. If there is eight inches in diameter and fifty feet high, it is a pretty good young tree.

Q. Well, what I want to get at is, I want you to answer that question. [183]

A. That is a pretty good young tree. I would not consider that tree scrubby unless there was a great amount of limbs on it, and you don't find trees eight inches in diameter, fifty feet high in the clear, in the timber in that country.

Q. Supposing it was eight inches in diameter at a distance of ten feet from the ground, the tree being fifty feet high, would you call such a tree scrubby or not?

A. Of course, I am talking about trees that grow straight up. I am not talking about these crooked trees. I call a tree like that a pretty good tree if it don't have too many limbs on it. If it has too many limbs on it, it would be worthless as a proposition; it would weaken it too much, but that is a pretty good tree, ordinarily.

Q. Now, in going along the line of your horseshoe, as shown on tract "A," Mr. Schwartz, looking to the south at about the center of this southeast forty



(Testimony of Harry H. Schwartz, Jr.)

of tract "A," was that timbered or not?

A. That is a little more than the center.

Q. That is supposed to be about the center (indicating)?

A. That is a little more than the center. The center is right here (indicating).

Q. Well, this would be about there, then?

A. Why, yes, there was timber all through there. A creek runs in there some place pretty close.

Q. Was it timber to the north of that point?

A. In a general northerly direction—in fact, it is timber pretty much all over, light and scattering. There is open [184] places down along the creek. The creek itself was pretty near all open that way or pretty close to it there.

Q. Taking the extreme west point of the horse-shoe, what was the character of the land looking at the various points of the compass from that point, that is, what was the character of the land looking south, north, east and west, with reference to its being heavily timbered or not?

A. No, there isn't any of it heavily timbered, what you would call heavily timbered, by any means. As I say, there is timber on it and timber scattered all over it.

Q. Would you say, or would *not not* say, that you were in a forest when you are at that point?

A. Well, a forest is most any kind of a timber.

Q. Well, what I want to get at is whether you would say you were in a forest at that point?

A. Yes; you are in a forest and probably open

(Testimony of Harry H. Schwartz, Jr.)

places through there.

Q. Taking the center of the most northern point of the horseshoe, Mr. Schwartz, will you describe the character of the country as seen from that point, that is, the character of the country looking north, south, east and west, as to whether or not it was timber?

A. That whole tract in there has got scattered timber all over it.

Q. Would you, or wouldn't you, say you were in a forest when you were at the extreme northern point of the horseshoe?

A. Yes; anything, even that scattered timber, is called a forest. [185]

Q. You would say it was a forest? A. Sure.

Q. On this most extreme point in the western part of the horseshoe, was it higher or lower than that country immediately west of it?

A. It was up and down all through there. I don't know just where that point would be; probably over the ridge a little west of there. That country is rough in there and up and down.

Q. How many ridges did you see, Mr. Schwartz?

A. Oh, there is several ridges there. I didn't pay any attention to how many ridges. There are ridges between those creeks, you know, running down between those creeks.

Q. Referring, Mr. Schwartz, to the most western part of the horseshoe, I will ask you whether or not that part of the horseshoe was higher or lower than the country immediately west of it?

A. I was on a ridge up in through there and of



(Testimony of Harry H. Schwartz, Jr.)

course the country sloped down. When a man is on a ridge and leaves it, it slopes down both ways.

Q. How far could you see west from that most westerly part of the horseshoe?

A. I should judge I could see over there 350 yards.

Q. Not more than 350 yards?

A. Maybe 400 yards.

Q. Not further than 400 yards?

A. I should think about that there. [186]

Q. Now, referring to the most extreme northern part of the horseshoe, Mr. Schwartz, I will ask you whether or not that part of the horseshoe, the most extreme northern part, was situated higher or lower than the country immediately north of it?

A. Well, coming down through in there, sometimes you was up and sometimes you was down.

Q. How far could you see north from the most extreme northern part of that horseshoe, Mr. Schwartz?

A. Why, in places there you could probably see thirty or forty yards and other places you could see as much as 200 yards.

Q. Not further than 200 yards?

A. There may be places you could see 400 yards there.

Q. Never further than 400 yards?

A. I shouldn't think so, in there.

Q. So that, at no place along the most extreme northern part of the horseshoe, could you see more than 400 yards? A. I should not think so.

Q. Now, referring to that portion of the horseshoe,



(Testimony of Harry H. Schwartz, Jr.)

about the middle of the southeast quarter, the southeast forty of the tract "A," looking south from that point—

A. That is, going up into the—that is, getting up into the timber right up in that point, up in through there so that you couldn't see very far, but back here further you could see along up—

Q. (Continued.)—referring, Mr. Schwartz, to that part of the horseshoe nearest the center of the southeast forty of [187] tract "A," looking south from that point, what was the character of the country as to whether it was timbered or not?

A. It was timbered in there.

Q. A timbered country? A. Yes, sir.

Q. How far could you see south from that point, Mr. Schwartz?

A. Oh, I don't know; you couldn't see so very far south at that point, I don't think, to my recollection.

Q. Could you estimate it in yards how far you could see?

A. Oh, probably, places in there you could see ten or twenty yards and other places you could see a hundred yards.

Q. Nothing more than a hundred yards, Mr. Schwartz?

A. No; I don't think right at that point that you could; no. That was going up into the timber there. Of course, there are places on that line that you can see away up.

Mr. MOSBY.—That is all.

(Testimony of Harry H. Schwartz, Jr.)

Redirect Examination.

(By Mr. MACDONALD.)

Q. Mr. Schwartz, you have been testifying from notes here during your examination. When and where were those notes made?

A. They were made on this piece of ground yesterday.

Q. At the time that you were making this cruise?

A. Yes, sir.

Q. Did you go over any of these adjoining quarters, in 28 or in 21 or 20, or 29, or did you see them? I mean the [188] quarters immediately surrounding the tract "A."

A. I didn't pay much attention to them.

Q. Now, in going over the course of this horseshoe as delineated on this map, you were able to see all of that tract "A," were you not?

A. Practically all of it; yes, sir.

Q. And, as I understand you—

A. From each point.

Q. And as I understand you, you testified that your estimate was over rather than under?

A. I think it would be, yes, sir, and I aimed to get all there was there.

Q. Now, this method which you adopted in making this cruise you may state whether or not that is the customary one adopted in making cruises of timbered land.

A. Oh, there is—there is quite a few ways of cruising timber; that is one of them.

Q. That is an approved method, is it?

(Testimony of Harry H. Schwartz, Jr.)

A. Yes, sir.

Q. And when you selected the three acres, for instance, in making your estimate, I understood you to say that you selected the best three acres?

Mr. MOSBY.—I object to the question as leading.

A. I got into the—got along through the timber, into all the timber there as much as possible. You could go out of the timber into those open spots.

Q. Now, Mr. Schwartz, what would you say that that land was [189] chiefly valuable for, as the result of your examination of and acquaintance with it?

Mr. MOSBY.—I object to the question because the witness has shown no competency to testify to the value of it, regarding anything excepting the timber.

A. Why, with the water along there, I should think that would be grazing land.

Q. Now, Mr. Schwartz, how far is this land from the nearest railroad?

Mr. MOSBY.—I object as incompetent, irrelevant and immaterial.

A. Why, from the point where I started at it is commonly reputed to be twenty-six miles.

Q. That was Springdale, was it?

A. Springdale.

Q. Now, taking into consideration the distance of this land from the railroad, what would you say as to the commercial value, at the present time, of the timber on there?

Mr. MOSBY.—I object to it as incompetent, irrele-



(Testimony of Harry H. Schwartz, Jr.)

vant and immaterial, and the further fact that the witness has not shown himself competent to testify as to the commercial value.

A. Well, timber like that far away from the railroad and having to be hauled over a heavy grade that way, is not generally considered of any commercial value, but it is given a value by the Government in selling it, and also by people in buying it to be along about what I placed it at, simply, I [190] should say, as a speculative value at some future time coming into value.

Q. What is the character of the country between that tract of land and Springdale, the nearest railway station, as to being hilly or otherwise? I mean on the road between the two places does that cross hills and so forth?

A. Well, quite a ways out of Springdale there was a pretty nice road and pretty level along through there; in fact, going up from Springdale over the divide it is a good road. But when you start down over that road it is steep and hilly.

Q. And difficult to transport lumber and other things, isn't it?

A. Why, it is not feasible to transport lumber or logs over that.

Recross-examination.

(By Mr. MOSBY.)

Q. Mr. Schwartz, how far would you estimate the most extreme western point of the horseshoe was from the center of tract "A."

A. Oh, that was in there probably 250 yards.

(Testimony of Harry H. Schwartz, Jr.)

Q. Two hundred and fifty yards?

A. Or 300 maybe; somewhere there.

Q. Referring, Mr. Schwartz, to that portion of the horseshoe nearest the center of the southeast forty of tract "A," how far would you say that that portion of the horseshoe was from the center of tract "A"?

A. From the center of the tract? [191]

Q. Yes, sir.

A. Oh, I see. In the neighborhood of 300 or 350 yards.

Q. Referring, Mr. Schwartz, to the most extreme northern part of the horseshoe, how far would that be from the center of tract "A," in feet?

A. In feet?

Q. Yes, sir, or yards there.

A. Well, I should say that was somewheres in the neighborhood of seven hundred feet.

Q. Seven hundred feet?

A. Yes, sir; somewheres around there or a little less, maybe.

Q. Mr. Schwartz, when did you arrive onto section 28?

A. I guess we must have got up there about seven o'clock.

Q. About seven o'clock in the evening?

A. Oh, no, in the morning.

Q. On the morning of the 5th?

A. Of yesterday, Sunday.

Q. Did you start, or didn't you start, immediately to work? A. Yes, sir, we started right to work.

Q. But you had your breakfast before you went?

(Testimony of Harry H. Schwartz, Jr.)

A. Yes, sir.

Q. And you stated, as I recollect, that you were four or five hours in going around this horseshoe?

A. Yes, sir, about five hours.

Q. About five hours?

A. About that, I should think. [192]

Q. You spent the time between seven o'clock in the morning of the 5th and one o'clock on the afternoon of March 5th, 1911, in making this cruise?

A. Yes, sir, to about half-past twelve, I think, it was.

Q. That is all the time you spent in making this cruise?

A. Yes, sir; that is all the time I was doing that.

Q. You started from Springdale that morning, didn't you? A. No, sir.

Q. From where?

A. I started from a cabin away out from Springdale. I should think it was about six miles maybe from it.

Q. About six miles? A. From the land.

Q. From the land? A. Yes, sir.

Q. Had you stayed all night there? A. Yes, sir.

Mr. MOSBY.—That is all.

Mr. MACDONALD.—That is all.

Witness excused.

(Here an adjournment was taken until to-morrow, Tuesday, March 7th, 1911.) [193]



Tuesday, March 7th, 1911.

Hearing resumed pursuant to adjournment; all parties present.

**[Testimony of W. R. Davey, for Complainant.]**

W. R. DAVEY, called as a witness on behalf of the complainant, after being first duly sworn to testify the truth, the whole truth and nothing but the truth herein, testified as follows:

Direct Examination.

(By Mr. MACDONALD.)

Q. Mr. Davey, please state your name.

A. W. R. Davey.

Q. What is your age?      A. Thirty-six.

Q. And your residence?      A. Portland, Oregon.

Q. And your occupation?

A. I am a practical miner at the present time for the General Land Office.

Q. How long have you been employed in the General Land Office?      A. A year ago last July.

Q. Had you any other service with the Government before this?

A. Why, I was a year in the Forest Service in practically the same work.

Q. What were your duties in the Forest Service?

A. Why, I examined lands for mineral and agriculture and [194] timber.

Q. How long were you in the Forest Division?

A. Why, almost a year.

Q. And had you any other service with the Government?

A. I had been Deputy United States Mineral Sur-

(Testimony of W. R. Davey.)

veyor since, I think, 1903.

Q. What experience other than this have you had in mining, Mr. Davey?

A. Oh, I have had practical mining experience; it has been my life work, you might say.

Q. I wish you would tell us what various experiences you have had in practical actual mining.

A. Well, since I have been able to get out and work I have done all kinds of prospecting and mining work in every capacity about a mine and graduated in the mining school, the Colorado School of Mines in '98, and have been mining in Old Mexico and Colorado and California, and have examined mining prospects in Oregon, Washington and Wyoming.

Q. You have worked underground, have you?

A. I have worked underground, yes, sir.

Q. Now, do you know Mr. Schwartz who gave his testimony here yesterday?      A. I do.

Q. You were present here during the giving of his testimony, were you?      A. Part of the time.

Q. But not all of it? [195]      A. No.

Q. Did you go with him at the time he made his cruise up there, concerning which he testified?

A. Yes, sir.

Q. I wish that you would describe the topography of that northwest quarter of section 28, being the tract described on Plaintiff's Exhibit 1 and marked "A."

A. Well, when I got within sight of the buildings I began to look over my notes and take compass read-



(Testimony of W. R. Davey.)

ings to determine roughly the location of where we were.

Q. Well, where were you at that time then?

A. Why, we were somewhere near the south or near the center of section 28.

Q. And south of the buildings?

A. Southeast of the buildings.

Q. All right; just describe in a general way the topography.

A. And there was a main creek there, I think they call it Hunter Creek, and there were several streams coming in there, from, you might say, all directions, coming in from the north and from the northwest and from the west and from the southwest and from the south. They all seemed to meet near a point where these buildings are or about just south of the buildings, I think, maybe 100 feet or so. And you might describe the topography there as a sort of a basin, with little ridges dividing the gulches and nearly all those little gulches you could see a long ways up. There was very [196] little timber in places there and the timber was in bunches. And when you got over on the south side of Hunter Creek you could look up all over, that is, towards the—to the west and northwest and there was a little bench right above the mine about 500 feet. Of course, you couldn't see right on the flat bench there from that point, but when you go over on the other side again, then you can see all over towards the south and the west, you could practically cover a mile in radius from that little circle in there of a quarter of a mile



(Testimony of W. R. Davey.)

around that center of the section. You could see the nature of the topography and the general improvements, the nature of the timber, that is, whether it was in bunches or if it was generally grown up timber.

Mr. MOSBY.—You said if it was generally grown up to timber?

A. I say see whether it was, whether the timber was just bunches and patches or whether it was all what you would consider one bunch of timber.

Q. Did you go over this tract of land yourself, Mr. Davey?

A. Not over the whole thing. I confined my work just to hunting up those various holes and examining them.

Q. Did you go over this part which is delineated here in red ink and which Mr. Schwartz called a horseshoe? A. No, no; I didn't go out that far.

Q. Did you make an estimate as to the amount of timber on there?

A. No, I didn't; just only a rough guess was all.

Q. What was your guess on that? [197]

Mr. MOSBY.—I object to it as incompetent, irrelevant and immaterial. The witness has not shown himself to be qualified or competent to answer the question.

A. Well, without saying anything to any of the others, as soon as I came down, as soon as I met them when we were ready to go, I said I would hate to give a hundred dollars for what timber was on that claim.

Mr. MOSBY.—I move to strike out the answer.

(Testimony of W. R. Davey.)

Q. You have had considerable experience, have you, in cruising timber and estimating timber?

A. Why, I have cruised timber and have gone through quite a bit, estimated it roughly, not technically.

Q. Would you be prepared to give an estimate of what is there?     A. No, not a close estimate.

Q. Well, from the portion of that tract you—

Mr. MOSBY.—My objection goes to any further testimony of this witness with reference to any of the timber on this quarter section of land.

Q. From your observation of that tract of land, Mr. Davey, would you say it was valuable?

Mr. MOSBY.—The same objection.

Q. I will start the question over again. As the result of your presence upon that tract and from your observations of the portions of it that you did see, state whether in your opinion it was valuable as a timber tract.

Mr. MOSBY.—The same objection.     [198]

A. Oh, I did not consider it so. I based my rough estimation on the fact that the timber was scattering. What I thought was first-class saw timber was very scattering and the balance of it was scrubby. It would be of very little use.

Mr. MOSBY.—I move to strike the answer.

Q. Now, Mr. Davey, did you make an examination of the tunnels and underground workings there?

A. I did.

Q. Before going into that further I would like to ask you what buildings, if any, did you find there?



(Testimony of W. R. Davey.)

A. I found either seven or eight. I would not say positively; seven or eight buildings there.

Q. Can you describe them in a general way?

A. There was one there, I think, that was used as a stable; another one apparently a bunk-house; in fact, I think there were two of them maybe were bunk-houses; another one was a mess-house, I think, and one probably an office and maybe small living, private living houses and a black—

Q. Did you find a blacksmith-shop there?

A. A blacksmith-shop; yes, sir.

Q. Were you able to go into any of those buildings? A. Yes, sir; I went into several of them.

Q. Did you find any mining utensils, tools, or appliances?

A. I saw a pick and shovel, some old tools and stoves, a mattress and bed-springs and tables and some dishes.

Q. Is there a mill or a concentrator up there?  
[199]

A. Why, it looked to me like they intended to build one. There is quite a large foundation and some logs thrown up and I think that was their intention.

Q. Now, then, I wish, Mr. Davey, you would come down to your examination underground there and detail what you found there.

A. I first went to that big tunnel described in the field-notes that I had, as being the long tunnel, and about 60 feet west of the center line running north and south through section 28.



(Testimony of W. R. Davey.)

Q. Have you those field-notes with you?

A. Yes, sir; I have them in the affidavit.

Q. Which affidavit is this tunnel mentioned in?

A. The affidavit of the surveyor. I have forgotten his name.

Q. All right, proceed.

A. I went into that tunnel perhaps one hundred feet, and it was caved in so I couldn't go in any further, but judging from the size of the dump I should say that it was better than 500 feet in.

Q. Do you know the direction that that tunnel took from its portal in?

A. In as far as I went it was northwest. I couldn't say positively, because there is interference from rails and one thing and another for a compass, without getting it back and checking it up, but its course was northwest.

Q. Did you find any mineral deposits in there?  
[200]

A. Why, the lagging is broken out of the back of the tunnel, and I went up in there and I saw the nature of the formation. I didn't see any vein.

Q. You saw no vein?

A. I didn't see any vein; no.

Q. Did you see any stringers in there?

A. No; I saw what was probably a pyrite dike had been metamorphosed. It had been broken up and squeezed up so that it had a soft vein-like structure, and you might say that a prospector might call a vein-like structure. There was a secondary deposit of iron and such as that.

(Testimony of W. R. Davey.)

Q. Did you visit other portions of the mine?

A. I did.

Q. I wish you would state what other portions you visited and what you found.

A. Then, I went up the hill along the course of that tunnel, and probably a couple of hundred feet beyond that, beyond the mouth of this lower tunnel there is another smaller tunnel, a prospect tunnel, and in that they had a little vein of quartz. It didn't show any copper.

Q. What was the character of that vein?

A. Well, it was broken up badly. You couldn't tell much about it. It had a general cleavage and probably what you would consider to be a vein, a quartz vein or stringer, you might call it.

Q. Did you visit other portions of the mine?

A. Yes, sir; then I went further to the northwest and I run across another tunnel there that is probably a cross-cut [201] tunnel, but I didn't go into that. The water is backed up in it pretty well towards the back. I went in it a ways, and from looking at the sump I didn't think it was worth while, as I considered it was a cross-cut tunnel from the position of it, and from the nature of the material on the dump. Then I went in a general way the general course of the big tunnel up on top of that bench, and there are a couple of shafts there. One shaft I did not go down; there was no way of going down very easily, and I saw a little quartz on the dump, but I didn't pay much attention to that. I went up to the other shaft, the further shaft up.



(Testimony of W. R. Davey.)

That is a shaft, I should judge, about fifty feet in depth.

Q. Now, just describe that fully.

A. I went down *and* the shaft; there is a little landing there. How much deeper it is than that I don't know as it was filled with water to that point. There is a plat at that landing and water up to the plat, and there is a drift to the northeast and I couldn't say positively how far that was. I didn't get clear to the face of it, because they had an underhand stope in that and there was no way of getting across that. It was filled with water and I don't know how deep it was. I stuck a pole down it some distance and I know I would have got good and wet if I attempted to get across it and might have gone clean out of sight. But from the shaft into this underhand stope, probably a distance of thirty feet, or something of that sort, you could see the character of the vein, a quartz vein. And they had stoped it [202] out, evidently, where it was the widest and showed the best, and the indications were that they had taken most of their ore out of the bottom. It was covered with water. They had a bunch of ore on the top, perhaps ten ton, probably taken out of that underhand stope. Also I took one sample of what I considered an average width and showing an average value from the shaft and into this underhand stope.

Q. What did you do with that sample?

A. I kept it in my possession and delivered it to an assayer here in town and had it assayed.



(Testimony of W. R. Davey.)

Q. Who was that assayer and have you his certificate?

A. I have got it here. Mr. Marsh—Richard Marsh.

Q. Will you let me see it, please?

A. (Witness produced assay certificate.)

Q. Is this the certificate which he gave you for that ore that you sampled?

A. That is the certificate which he gave me for the sample.

Q. Did you observe, Mr. Davey, there, any ore outside on the ground? A. How is that?

Q. Did you observe, Mr. Davey, any ore outside on the ground there, which apparently had been extracted from the mine? A. I didn't.

Q. Did you make an examination of the dumps?

A. I did.

Q. What was the general character of them?

A. Well, I didn't make any particular examination of the [203] shaft dump there. It was covered with snow, but I did of the ore they had piled up at the shaft.

Q. And what did you find the character of that ore to be?

A. Why, the sample of the ore at the shaft looked a great deal better than the sample that I took.

Q. What did it show?

A. It showed copper, principally—copper and quartz.

Q. Have you described all the examination that you made underground there?

(Testimony of W. R. Davey.)

A. I think so; yes, sir.

Q. Now, were you able to make any examination of the surface showings or the outcropping, or was the snow so deep that you could not?

A. Why, very roughly. I saw it in one or two places, but the general surface examination I could not make.

Q. I will ask you to state, Mr. Davey, whether or not, in your opinion, from your examination of the mine and your observation there, if a person would be justified in spending time and money in the development of that property?

A. They certainly would.

Q. Now, state the reasons why, in your opinion, they would be so justified.

A. My opinion is this, that it is in a recognized mineral belt. It is commonly known that there are mines, working mines, both south and north; that it is common knowledge that the formation is practically the same—

Mr. MOSBY.—I object to this line of answering, and when the witness finishes his answer I move to strike it out on the [204] ground that he is not qualified to testify to the character of the country up there outside of this particular quarter section now in controversy.

Mr. MACDONALD.—Proceed with your answer, Mr. Davey.

A. It is general knowledge that the formation for a considerable distance south and north, including these mines that are working, is practically the same

(Testimony of W. R. Davey.)

with the formation, as I saw it in that drift, from the bottom of the shaft; also from other dumps and the places where I could see in the tunnels, where it was caved and so on, shows that it is a lime formation traversed by a pyrite, probably a pyrite or diabase in character, and that is generally accepted by prospectors as being a good formation to hunt for ore in; and the fact that there is a quartz vein running through it with ore in it would be sufficient, in my judgment, to warrant the further work in developing the property with reasonable expectation of opening up a paying mine.

Q. Mr. Davey, from your observation of the workings there, and the development that has been done, state whether or not in your opinion that has been done in a miner-like manner and with an apparent intention of developing the property in good faith.

A. The majority of it has; yes, sir.

Q. Now, I wish you would state what, in your opinion, that tract "A" is principally valuable for.

A. Why, it is principally valuable as mineral ground.

Q. Did you have an opportunity to examine its character [205] with reference to stone deposit?

A. Why, there is no stone outcrop; there is nothing to show that it is valuable for stone.

Mr. MACDONALD.—I think that is all.

Cross-examination.

(By Mr. MOSBY.)

Q. Mr. Davey, when did you first enter the Government service?      A. As what?



(Testimony of W. R. Davey.)

Q. In any capacity; when did you first go into the service of the United States Government?

A. Oh, I was clerk in a postoffice so long ago, I don't remember.

Q. Well, when was it?

A. Let me see; probably sixteen years ago. I wouldn't say positively.

Q. What did you do after that?

A. Why, I went into the mining business after that.

Q. When did you first go into the mining business after that?

A. Why probably directly after, and probably before.

Q. How long before have you been in the mining business?

A. I was brought up in the mining business, but I didn't stay at it every day in the year all my life.

Q. You were about 16 years old when you went into the postoffice?

A. Probably; something like that; but I was only in there [206] about two months, I think. It was temporary employment.

Q. How long after you were sixteen did you go into the mining business?

A. I was in the mining business at that time and before.

Q. Well, I am not asking you about before, but after you left the Government Service.

A. I couldn't tell the exact days after, but probably that same year. I was every year, as I remem-

(Testimony of W. R. Davey.)

ber, from the time I was probably fourteen years old, up.

Q. I am not asking about the time before you were sixteen, Mr. Davey. I am asking about the time you said you quit the postal service when you were about sixteen years old, and afterwards you went into the mining business?

A. What do you want to know—about the days and hours?

Q. No, I want to know when it was you went into the mining business after you retired from the postal business.

A. Do you mean the Government Mining Service?

Q. No, sir. You said you were in the postal service and afterwards went into the mining business, or went mining.

A. I went mining; yes, sir.

Q. Now, I want to know how long that was after you left the postal service.

A. Perhaps that same year, sometime.

Q. I don't care about perhaps or not. I want you to give me a direct answer.

A. Well, I can say I did some mining that same year.

Q. That same year? [207] A. Yes, sir.

Q. In what way?

A. Why, in working out assessments and sorting ore and such as that—practical work.

Q. Where was this?

A. That was in Colorado.

Q. What place in Colorado?

A. Hinsdale County.

(Testimony of W. R. Davey.)

Q. What place in Hinsdale County?

A. I couldn't point out to you the exact spot. I don't remember; there are so many hundred of districts that I worked in.

Q. You know what mining district it was in?

A. What mining district?

Q. Yes, sir.

A. I couldn't tell you what mining district it was in, because there are about five mining districts in that county.

Q. I should think you would remember what particular mining district you were working in.

A. If you can show me what particular one I worked in you can do more than I can do. I worked in hundreds of them, and I haven't kept track of that, since that first time.

Q. A man ought to be able to tell in what mining district he worked in there, if you worked in them at all.

A. I could tell you what mining districts I have worked in at different times, if that will do you any good.

Q. Well, how long, Mr. Davey, after you went into the mining business, after leaving the postal service, how long [208] did you remain in the mining business?      A. You mean continuously?

Q. Yes, sir.      A. I couldn't say that.

Q. Did you mine as much as a year after you started in?      A. Not continuously.

Q. What did you do then?

A. Well, I couldn't tell you what I did, the next



(Testimony of W. R. Davey.)

step I took, exactly.

Q. Well, what I want to find out, Mr. Davey, is what experience you had in mining prior to the time you went into the Government Service—at that time; that is what I want to find out; if that will facilitate it.

A. Well, I can say to you as I did before—

Q. You didn't go into the details before and what I want to get at now is the details.

A. Well, I haven't got any memory as to the exact days.

Q. I don't care about the exact days. Just approximately, is all I want.

A. Well, from perhaps the time I was fourteen years old I took an active interest in working assessments and sorting ore, and such as that. I didn't stay at it continuously all the time during each year.

Q. Yes, sir.

A. But I would perhaps help work several assessments during the year and the balance of the time would go to school and do something else. In the winter time you can't work in [209] the mines there, that is, unless you are a practical miner getting into one of the big development mines, and I didn't do that when I was so young; and I spent four years at the Colorado School of Mines.

Q. That made you about twenty years of age, or eighteen?

A. I was twenty when I entered and twenty-four when I graduated.

Q. Twenty-four when you graduated?

(Testimony of W. R. Davey.)

A. Yes, sir; in 1898.

Q. In 1898 you graduated? A. Yes, sir.

Q. And what did you do after graduation?

A. And I did mining in the meantime three months each year in vacation; and immediately after graduation I went down to Old Mexico and mined down there.

Q. In what capacity did you mine down there?

A. Why, as superintendent of a mine.

Q. As superintendent of a mine? A. Yes, sir.

Q. I simply want to get a detailed history of your experience as a mining man, Mr. Davey.

A. Well, that is it up to that time.

Q. Is that all? A. That is not all; no.

Q. Well, continue.

A. I think I probably left out some.

Q. Sir? [210]

A. I say we probably left out some.

Q. Well, I supposed you gave me all. I didn't want you to leave out anything.

A. You mean a detail of the jobs I worked on and the positions?

Q. The details. I want a detailed statement as to your history as a mining expert; that's what I am seeking to get.

A. As an expert, a mining expert?

Q. By that I mean as a mining man. I mean in the different parts, as a mining engineer, if you are one, and as a geologist, if you are one, and as a mineralogist and as an assayer, if you are one, and as a practical miner, and so forth.

(Testimony of W. R. Davey.)

A. I didn't start in to the expert business so young as fourteen years old. I misunderstood you.

Q. I didn't understand you were an expert at that time, but I meant the history of your experience as a mining man, and by a mining man I mean all you had done as a mining engineer, consulting engineer, as an assayer, a mineralogist, a geologist, a practical miner, a mucker, or anything else in connection with mining.

A. Well, then, you want it divided up into two different periods?

Q. Well, if you will, yes.

A. My expert work after graduation and my preparatory work leading up to that?

Q. Yes, sir.

A. That is what I was trying to tell you, what my work leading up to that was a portion of each year, you might say [211] from the time I was fourteen years up to the time I entered college, and during three months each year that I was in college, and after that why you might consider it of an expert work, from '98 on. Then I—well, prior to that time, though, I worked in most every capacity about a mine, sorting ore, mucking, drilling and every other capacity. I spent six months down in Mexico working for the officials of the E. P. Ellis—it was the Two Republics Gold Mining Company, Edward E. Roberts, president.

Q. That is the sum of your experience?

A. Up to that point.

Q. To '98?



(Testimony of W. R. Davey.)

A. Oh, that is the winter of '98 and '99.

Q. And subsequent to that time?

A. And after I came back I went into the assay business for myself for the summer. I think it was the summer of 1900, and probably that winter I worked on the Bachelor Gold Mining Company, I think it was, C. F. Meek, President. And I worked there that winter, and the following year or the following summer I went into the assay business again. Let's see; I can't tell you date exactly.

Q. Well, just approximately.

A. And then following that for a little over two years, I managed the property. But there was three or four months, four months, I think, during one winter when one of the company wanted me to go down to California to do some work for him, down at Manor and several other little places out around [212] that neighborhood—I have forgotten the names of them now—southeast of Los Angeles. Then I returned and worked; maybe, six months in the mine again, and then I went as engineer for the Hanna Mining and Milling Company.

Q. What year was this?

A. Oh, let me see, probably—probably the year 1903. I can't say positively, without looking up my notes, 1903 or '04, somewhere along there; maybe 1904, probably, is nearer.

Q. Yes, sir.

A. And then, for a couple of years I did a good deal of expert work, traveling around different places and working as consulting engineer for this

(Testimony of W. R. Davey.)

company at the same time.

Q. This Hanna Company?

A. The Hanna Company; yes, sir.

Q. That takes you up to 1906?

A. To 1906. I think it was 1906, maybe, and in 1906 I went into the Forest Service.

Q. And then afterwards you went into the Land Office? A. Went into the Land Office.

Q. And in what capacity were you employed in the Forest Service?

A. Why, my official designation was land examiner.

Q. What were your duties in that connection?

A. Why, I was examining lands to see what they were chiefly valuable for. I examined some timber lands and homestead lands and mining claims.

Q. Did you know anything at all about the character of [213] this, or had you been told anything at all about the character of this northwest quarter of section 28 in the township and range mentioned?

A. I had.

Q. Before you went on it? A. Yes, sir.

Q. What had you been told?

A. I was inquiring from anyone that knew about that country there, without them knowing who I was or for what purpose I was trying to get the information.

Q. When was this?

A. Why, from last Saturday, the 4th, I think it was, and the 5th.

Q. Now, Mr. Davey, why was it you did not make



(Testimony of W. R. Davey.)

that assay? You spoke of being an assayer. Why was it you did not make that assay yourself?

A. I haven't got an outfit and I am not prepared to make any assays.

Q. You have no means of knowing if the assayer used some material other than what you gave him when he made the assay? Can you make an oath that the assayer used the material you gave him?

A. Can I what?

Q. Can you make an oath that the assayer used that ore? A. Oh, no.

Q. You have no personal knowledge of that?

A. In my judgment he did, because— [214]

Q. In your judgment?

Mr. MACDONALD.—Let him finish his answer.

A. (Continued.)—because in my judgment, I had my mind made up about what that ore ought to run.

Q. Mr. Davey, I will ask you to give me a direct categorical answer to this question: Have you or haven't you any personal knowledge that the assayer whom you gave that sample of ore you mentioned a few moments ago in your testimony, whether or not that assayer used that sample in making the assay, the report of which has been referred to by the counsel for the Government?

A. You mean if he might have switched the samples?

Q. Exactly.

A. Why, I can't swear that that is the same sample, or that that is the exact true value of the ore that I gave him.



(Testimony of W. R. Davey.)

Q. Yes, sir.

A. But in my judgment it is a very close approximation.

Q. Now, you accompanied Mr. Schwartz on his cruise, did you, Mr. Davey?      A. On the cruise?

Q. Yes, sir; on the cruise.

A. On the land, you mean?

Q. Yes, sir.      A. No.

Q. Well, you remember his testimony yesterday, in which Mr. Schwartz was asked this question: "Who accompanied you on this cruise, Mr. Schwartz?" and Mr. Schwartz's answer was—this is, from the stenographer's record—"I was alone part [215] of the time and part of the time Mr. Davey was with me, and part of the time I believe his name was Taylor, a man that said he knew that property up there pretty well, who went with us. I guess his name was William Taylor; they called him Bill." I will read you the question before that: "Well, then, all the cruising that you did was within that horseshoe, was it? A. Yes, sir; that is the system in cruising the whole timber; that is recognized as a system of cruising and a good one. It is pretty close, I think. Q. Who accompanied you on this cruise, Mr. Schwartz? A. I was alone part of the time, and part of the time Mr. Davey was with me, and part of the time I believe his name was Taylor, a man that said he knew that property up there pretty well, who went with us. I guess his name was William Taylor; they called him Bill." You heard that question?

A. I believe I heard the question; yes, sir.

(Testimony of W. R. Davey.)

Q. Well, was Mr. Schwartz wrong or not when he answered that question?

A. He was right in a general way.

Q. Upon how much of that cruise did you accompany him?

A. Why, we left Springdale together and—

Q. I don't care anything about the Springdale part of the time.

Mr. MACDONALD.—Let him finish his answer.

Q. I am talking about you cruising the property.

A. That is what he was referring to, I think, that trip.

Mr. MACDONALD.—Go ahead and answer.

A. Referring to the trip which was generally considered [216] as a part of the cruise, or part of the examination. We went out on the land together and part of the time we were on the land together. We examined some of the buildings in common; we established where the point of the middle of section 28 should be and several other points in common and took in the general aspect of the country together from different view points.

Q. About how much ground did you and Mr. Schwartz cover together?

A. What do you mean—in acres?

Q. No; I mean lineally in miles or quarter miles or furlongs on the ground; how much did you cover together on that quarter section?

A. Oh, that would be hard to estimate. We tramped back and forth over that same ground a part of the time, I suppose.



(Testimony of W. R. Davey.)

Q. For how much time?

A. Well, I don't know. I couldn't give you a definite answer to that either. It didn't take us a great while to establish our position there, and we hurriedly looked through the buildings and sized the situation up and figured the north and south line and the east and west line from the center of section 28, and got a general view of the whole northwest quarter of section 28, and then he started off on his trip and I started out on mine, I went over to the tunnel.

Q. How did you get up from Springdale to this ground, Mr. Davey?

A. Went out in a sleigh. [217]

Q. In a sleigh? A. That is, part ways.

Q. Part way, and the balance of the way, how did you go? A. On snowshoes.

Q. On snowshoes? A. Yes, sir.

Q. Did you use snowshoes when you were on the ground all the time? A. Part of the time.

Q. How deep was the snow on the ground?

A. Why, in places, I should judge it was five feet, and places it was maybe a few inches and some places it was bare. I should judge it would be an average of close onto three feet.

Q. Are you educated as a surveyor, Mr. Davey?

A. Yes, sir.

Q. How did you establish the center of section 28 that you have mentioned?

A. Why, from the notes, the notes describe a long tunnel having a northwestern course and as being about 600 feet west of the north and south line



(Testimony of W. R. Davey.)

through the center of section 28, which established the general position of the north and south line. Then we followed along that course to a point approximately 500 feet from those buildings there.

Q. Where was your starting point on this survey?

A. Where was the starting point?

Q. Yes, where did you start? [218]

A. Our starting point was from that tunnel.

Q. That tunnel?

A. To get your north and south line.

Q. You refer to the main tunnel, now?

A. The main tunnel.

Q. And you said your notes described the center of section 28; is that correct?

A. That is correct, of section 28.

Q. As being a certain direction and a certain distance from the mouth of this tunnel?

A. No; I said the north line runs through the center of section 28.

Q. The north line?

A. The north and south line.

Q. The north and south line?

A. Runs through the center of section 28.

Q. Where did you get those notes—who made those notes, Mr. Davey?

A. Why, the surveyor that surveyed the land.

Q. You don't know whether or not those notes are correct or not? A. I do not.

Q. You didn't make any check, you didn't verify them at all?

A. No, sir; that is, with reference to the general

(Testimony of W. R. Davey.)

public survey, I did not.

Q. I didn't catch your last answer.

A. With reference to the general public survey.

[219]

Q. I don't understand what you mean by that; explain what you mean.

A. You know what a public survey is?

Q. Yes, sir; that is what we are talking about.

A. Well, it is with reference to that.

Q. You don't know whether or not those notes—

A. With his notes there was also a map filed which showed that the survey of the ground was fairly accurate. That is, accurate with respect to the measurements that he made.

Q. Are you familiar with Government surveys?

A. I am.

Q. Is the Government in the habit of driving a center stake?     A. No, sir.

Q. Sir?     A. No, sir.

Q. Then, did you, or didn't you, find anything in the nature of a center stake in the center of that section?     A. I did not.

Q. How did you know you were at the center of the section?     A. Just from the notes.

Q. Just from the notes?

A. Yes, sir.

Q. What did you use to determine the proper direction to take from the tunnel?

A. I used an instrument. You mean the nature of the instrument?     [220]

Q. Yes, sir.

(Testimony of W. R. Davey.)

A. I used a Bramer pocket transit, they call it.

Q. A what? A. A Bramer pocket transit.

Q. A pocket transit?

A. Yes, sir; you would call it a pocket compass.

Q. Did you make any allowance for the variation or deviation of the needle there? A. Yes, sir.

Q. What did you make?

A. About nineteen degrees.

Q. Nineteen degrees from what?

A. Nineteen degrees from what?

Q. Yes, sir. A. You mean the variation?

Q. Yes, sir.

A. I varied nineteen degrees from the magnetic north.

Q. From the magnetic north. Why did you make that number of degrees' deviation?

A. Because I thought it was proper.

Q. Well, what had you to base that on?

A. Why, from the information I had at hand.

Q. What information?

A. I had asked persons up there what was the general variation around there.

Q. Persons. You know, as a matter of fact, that the variation differs from time to time, don't you?

[221]

A. I do, a very small amount they—

Q. Sir? A. A very small amount.

Q. You spoke of some iron being in that locality?

A. Yes, sir.

Q. Did you make any allowance at all for the fact that there was iron in that locality, and magnetic



(Testimony of W. R. Davey.)

iron, possibly?      A. Magnetic iron?

Q. Yes, sir.

A. I didn't mention magnetic iron.

Q. I know, but I am mentioning it now.

A. I checked my readings from different points, so that I know there was no magnetic iron had any influence on them.

Q. Now, you spoke of this property. Were there any evidences there of workings?      A. Yes, sir.

Q. Were there any evidences there of recent workings?      A. How recent?

Q. Well, last year.

A. I couldn't say as to that, positively.

Q. Well, the last two years?

A. Oh, yes; it seems to me that there must have been some work done inside of two years.

Q. How much work would you say had been done there inside of two years?

A. Oh, I couldn't say that.

Q. How far did you go into the main tunnel, Mr. Davey? [222]

A. I couldn't say positively, as I didn't measure it. As near as I can remember, something like a hundred feet, perhaps.

Q. What did you use to lighten it up in there?

A. Well, it was sufficiently light.

Q. It was sufficiently light?

A. Yes, sir. I had candles and a match, too. I used those when I looked at the roof of the tunnel.

Q. Just a candle and a match?      A. Yes, sir.

Q. You couldn't tell very much about the vein in

(Testimony of W. R. Davey.)

there or ledges in there with a candle and match, could you?

A. You are speaking of the main tunnel?

Q. Yes, sir.

A. I didn't see any vein or ledges in there?

Q. You didn't see any in there? A. No, sir.

Q. Did you see any in the other tunnel?

A. Yes, sir.

Q. How big was it in there, what was the character of it?

A. It was broken up. I couldn't tell whether or not it really was dipping one way or dipping another way, or what, but it had a general vein character, quartz vein filling and such as that, but the position of it or how big or how long it was, you couldn't tell anything about it.

Q. How far in did you see this vein?

A. Why— [223]

Q. (Interrupting.) This is in the upper tunnel now, I understand you are speaking of.

A. That is in the second tunnel, perhaps two hundred feet or something like that—I guess those distances was not material—perhaps 200 feet above the mouth of the other tunnel and something like twenty feet. I didn't measure that.

Q. Did you go to the breast of that tunnel?

A. I did.

Q. How far in from the mouth of the tunnel was it?

A. That is what I say I did not measure it. It was perhaps twenty feet.

(Testimony of W. R. Davey.)

Q. I thought you were talking about the distance from the lower tunnel to the upper one?

A. That was guesswork, but that was about 200 feet.

Q. Each 200 feet?

A. I said the distance in was about 20 feet and the distance apart was 200 feet.

Q. Oh, I didn't understand you. What kind of a vein did you call that?

A. What kind of a vein?

Q. Yes, sir.

A. I told you that I couldn't say anything particular about it, only it had the main filling there and quartz, quartz matrix.

Q. Where was this pyrite dike?

A. That pyrite dike is the dike this main tunnel was in and also the other tunnel. [224]

Q. Where did you get the sample of ore that you brought down and had assayed?

A. Out of the shaft, a shaft up on top of the bench, approximately 500 feet northwest of the mouth of this lower tunnel.

Q. How deep was this shaft?

A. I didn't measure it, only I estimated the depth to be about fifty feet. That is to the landing down there. They had a plat on it.

Q. Did you go down, or didn't you go down that shaft? A. I did go down.

Q. You did go down; from what part of the shaft did you get this sample?

A. Northeast of the shaft, about halfway between



(Testimony of W. R. Davey.)

there and an underhand stope maybe about thirty feet in.

Q. It was about thirty feet from the mouth of the shaft?

A. From the bottom of the shaft to the underhand stope was about thirty feet, and I took this sample approximately halfway between, about fifteen feet from the shaft, from the corner of the shaft in a northeasterly direction, from the bottom of the shaft.

Q. That is, you took it from near this underhand stope?

A. I took it halfway between the shaft and the underhand stope, in the back of the tunnel, the roof of the tunnel.

Q. The roof of the tunnel? A. Yes, sir.

Q. And that distance was about how far, did you say? [225] A. Which distance?

Q. The distance between the underhand stope and the bottom of the shaft.

A. I said it was approximately thirty feet.

Q. About thirty feet?

A. I had to straddle the water there and I couldn't step it off. I just had to make a rough approximation.

Q. Did you think that there was a good showing of ore there in the bottom of this tunnel where that stope had been opened?

A. I thought there was sufficient there to warrant a man in doing more digging.

Mr. MACDONALD.—In doing what?

A. Doing more digging.

(Testimony of W. R. Davey.)

Q. Where did you see this secondary deposit of iron that you mentioned?

A. Down in the main tunnel.

Q. How far in?

A. I saw it where it caved out to the back of the tunnel, approximately one hundred feet in from the mouth, where it caved.

Q. One hundred feet in?      A. Yes, sir.

Q. You said it was stoped out where it was widest and showed the best?

A. I said that possibly so, yes. That is the general rule.

Q. I would correct the witness there to say what he said [226] there was no use of the word "possibly" there. Did you go down any other shaft except this one there, Mr. Davey?      A. I did not.

Q. Did you examine any of the ore on the dumps there?      A. I did.

Q. Did you take any samples from them?

A. I did not.

Q. Why didn't you take a sample of the ore from the tunnel, Mr. Davey?      A. Which tunnel?

Q. From either of them.

A. Because the main values, as I thought, would be in copper, and unless you can see the copper there is no use to get an assay made.

Q. You took a sample, then, from what you considered to be the best part of the mine to show the copper values?

A. I did; that is what I considered the best of the part there that I could see.



(Testimony of W. R. Davey.)

Q. From what you could see? A. Yes, sir.

Q. You took no samples of ore, then, from any other part of the mine; you took simply one sample?

A. I just took one sample to assay.

Q. Now, Mr. Davey, would you think you would be treating your client right if you had been sent out by a mining company to report on a property of this kind and simply took one sample of ore and that from what you would consider to be the best part of the mine to show the copper values? [227]

A. It would depend on what the client wanted to know.

Q. Then, your testimony is that you would get the information that you thought your client wanted?

A. I don't understand you.

Mr. MOSBY.—Read the question. (Last question read.)

A. If they wanted a general sample of the mine, I would get a general sample of it. If they wanted to get my judgment on what the mine would be worth, I would use my judgment, irrespective of whether I would sample every ten feet or took only one sample.

Q. Mr. Davey, do you think that any mining expert in the land could correctly report on a mining property simply by taking one sample of ore, and that from what appeared to be the best portion of the mine? A. Correctly report?

Q. Yes, sir.

A. You mean if he could estimate the values of the whole mine?

Q. Do you think he could report as to whether or



(Testimony of W. R. Davey.)

not the property in regard to which he was sent to make a report was or was not a property in which his principals—assuming it to be a mining company—would care to invest money?

A. I certainly could, in some respects.

Q. In what respect?

A. If a man goes out, if a new camp was reported discovered and there is only a ten foot hole, and he knows that somebody reports a rich sample, a mining man will send an expert out there to see whether or not that sample came from [228] mineral-bearing rock in place, and if it did and he was favorably impressed with the country in general and other conditions, he would not consider whether or not that strike went down and up or whether there might be a million tons there, he would take it for granted that there was a possibility of making that a paying mine and expending money for development, and one sample would be sufficient.

Q. Then, in your experience as a mining expert reporting to the company that employed you, you would content yourself, for the purpose of making up your opinion, I presume, on simply having taken one sample of ore, and that from the best part of the property you were sent to examine, and base your report on the mine from the assay shown by that sample?     A. Not in the way you mentioned.

Q. In what way, then?

A. You are speaking of the best part of the mine. Those other workings were, in my judgment, development tunnels and for prospect work hunting for the

(Testimony of W. R. Davey.)

vein in which that ore occurred in the surface and cross-cut tunnels, in other words. Now, there is no use sampling a cross-cut tunnel unless it has got a vein, and if they have got one shown in the vein you want to take your samples there and find out what the values are. There is no use going out to the country rock for samples.

Q. But you took no samples at all, Mr. Davey, as your testimony shows, from the dumps on the property?

A. That is so when it would come around to assaying it, I [229] could swear that the dumps came from the holes, which I could not.

Q. If the dumps were on the ground the presumption in law and in fact would be that the dump was from the holes?

A. I couldn't sample the whole dumps, and if I got any sample, I might have got a sample that may have been carried there from somewhere else.

Q. Do you mean to say, Mr. Davey, that it is the practice of mining experts who are sent to report on property throughout this country to content themselves in simply obtaining one sample of ore and having that assayed and make that a basis for their report on the advisability of their principals investing money in such property—on the return of the assay shown from that sample?

A. They do in a developed mine.

Q. I am speaking now of an undeveloped mine.

A. Of a prospect—

Q. Of such a matter as you examined there.



(Testimony of W. R. Davey.)

Mr. MACDONALD.—Let him finish his answer.

A. You want to get at the general method of sampling?

Q. Yes, sir; that is what I want to get at.

A. Well, where a well-developed mine has a large body of ore shown up by various workings, they sample it in a systematic way, depending on the nature of the ore. If it is a low-grade ore, they would take it about ten feet apart, a streak over the back of the tunnel every ten feet apart. If it is spotted high-grade ore, they will come down to five feet. [230] Now, you may have a prospect where there is only one showing, a prospect shaft, for instance, and there is only room to get one sample, a new prospect just started; there is only room to get one sample. Now, that one sample may excite the whole community and the men that have money to invest in mines will send some expert out very likely to see and to verify the report that that sample did come from there, and their expert will go down in that hole and take a sample, take a general sample of the ore in place and probably take a little means to see that they were not salted and such as that, but one sample will suffice, that is, if they cannot get any more, if there is no more ground opened up.

Q. Well, this was not a developed mine, Mr. Davey?

A. No, that is not a developed mine.

Q. This was simply a mining claim?

A. That is just a mining claim, yes, sir.

Q. Now, don't you think it would be very improper



(Testimony of W. R. Davey.)

for you or any other mining expert to content himself on reporting to his principals that the property was or was not a mining property, was or was not a good prospect, was or was not a good place to put their money in a mining venture, on the strength merely of a single assay that you had made, and that, from what you consider to be the best portion of the mine? Don't you think that would be a very hazardous thing for you, as a mining expert, to do? <sup>54</sup>

A. That best portion of the mine is a clause that don't rightly belong there. As I say, the other workings had no [231] bearing on the fact that there is only one portion of that vein exposed, as far as I could see. That lower tunnel may show more, if you could get in, and if it did, I would have taken samples there, but from the fact that the balance of the workings was in a formation that did not show copper ore, I did not get to take any samples. Another reason why it is, I would judge—I couldn't say positively, but I would judge it is not the best place in the mine, and that is for the reason that there is better ore showing on the surface of the dump that they have extracted there from that hole very likely, and it probably came out of that underhand stope, and it was quite wide there, wider than I could straddle, and my judgment would be that that ore came out of there, which would be the best place in the mine and my sample did not come from the best showing. And from the ore in sight there my sample was away below the best, or was an average of what was in sight that I could swear to, that I saw. I

(Testimony of W. R. Davey.)

wanted to be fair about it.

Q. Is there any other ore in any other part of the mine?

A. I couldn't say as to that tunnel. I understand that they have got good ore down there, but I couldn't say. I wasn't in it; I couldn't get in it; it was caved.

Q. In your opinion, would the dike that you mentioned be more highly mineralized at the surface or at greater depth?

A. Why that is something you can't say positively.

Q. Well, I am asking for your opinion of it.

A. Well, I, as a rule, the highest grade ore is what they [232] usually call surface ores, but the surface ores may extend down several hundred feet.

Q. Did you take any surface ores—you said you didn't?

A. This is practically the surface; they have no depth there as far as I can see.

Q. Did you see any indications at all of the continuity of this dike? A. Yes, sir; I seen a ridge.

Q. I will ask you once more, Mr. Davey, if it would be treating—assuming, now, that you were an employee, not of a public corporation, the United States Government, but a private corporation, some mining company, and had been sent to report on the advisability of your principals putting money into this mining ground located on this quarter section in controversy, if you would be doing the proper thing by them, your principals, and advising them correctly to put their money into these claims when you had taken only one sample from the ground?



(Testimony of W. R. Davey.)

Mr. MACDONALD.—I object to it as incompetent, irrelevant and immaterial and having been asked and answered three or four times.

A. Shall I answer?

Mr. MACDONALD.—Yes, you may answer everything.

A. Why that assay, from my viewpoint, cut no ice at all.

Mr. MOSBY.—I want the record to show that this question calls for an answer of yes or no, and I insist on an answer of yes or no. [233]

Mr. MACDONALD.—Now, you can answer in your own way and as fully as you want to.

A. (Continued.) The fact that I took an assay was for reference more than anything else. My judgment was based on what I saw. I could see the copper in the ore. I could see the formation and that along with the assay which verified it. My judgment, as far as it went would be sufficient, in my estimation, to warrant a man in the further expenditure of money in developing it.

Q. How long were you on the ground, Mr. Davey?

A. Well, I didn't keep a close tab on it; I couldn't say exactly.

Q. You spoke of that being a mineralized country. Do you know of any paying mine in the locality?

A. Only from hearsay.

Q. Nothing but hearsay?

A. I am satisfied, because I saw teams going out there with supplies, and it is common knowledge that there are working mines at the present time both



(Testimony of W. R. Davey.)

north and south within probably four or five miles of this.

Q. That quarter section has some timber on it, hasn't it, Mr. Davey?     A. Yes, sir.

Q. What is the surface of the ground there in regard to being rocky or not?

A. I couldn't tell whether it had much small rocks or not. There are no bluffs to speak of. You have reference to [234] the soil?

Q. Yes, sir, the soil.

A. Well, I couldn't say as to that.

Q. You couldn't see the soil?

A. I couldn't see the soil, or any sufficient amount of it, to see any in the bottom. I would imagine the bottom there would not be very rocky.

Q. I will call your attention to a part of the testimony given yesterday by the witness Schwartz. He was asked: "Q. Well, that looks like a timbered country doesn't it, Mr. Schwartz, in that picture?"

A. Yes, sir, but pretty poor timber.     Q. It is worse for agricultural land than it is for timber, you would say, wouldn't you?     A. It is not agricultural land; it is too rough and it is very rocky up there too, on the ridge." Did you or didn't you go up on the ridge, Mr. Davey?

A. I don't know which ridge; there are numerous ridges around there.

Q. Did you go upon any of the ridges?

A. I certainly did; yes, sir.

Q. Did you find them to be rocky or not?

A. That might have had reference to the dumps

(Testimony of W. R. Davey.)

there, those holes, they are rocky, but he may have seen more bare ground than I did.

Q. Well, I will call your attention to Defendant's Exhibit No. 1, Mr. Davey. Now, I am referring, in order to make my question plain, to the portion of the testimony of the [235] witness Schwartz given yesterday, in which he was asked this question: "Q. Referring to Defendant's Exhibit No. 1, Mr. Schwartz, do you recognize that as being a photograph of any portion of the locality which you visited in making this cruise? A. Yes, sir, that is probably the tunnel. That was pretty heavily covered with snow when I was in there. Of course it looks considerably different now than when this picture was taken. Q. Well, that looks like a timbered country doesn't it, Mr. Schwartz, in that picture? A. Yes, sir; but pretty poor timber. Q. It is worse for agricultural land than it is for timber, you would say, wouldn't you? A. It is not agricultural land; it is too rough and it is very rocky up there, too, on the ridge." Now, I will ask you, Mr. Davey, in reference to the testimony given by Mr. Schwartz which I have just read, whether or not you consider that testimony as correctly describing the character of the land? A. Shown in that photograph?

Q. Defendant's Exhibit No. 1.

A. From his answer to the question just read I cannot understand that it means the exact portion that is shown in the picture. And anyway, I could not see a sufficient amount of the surface of the



(Testimony of W. R. Davey.)

ground to say positively whether it was very rocky or not.

Q. You can't say, then, Mr. Davey, from any knowledge that you have of that northwest quarter of section 28 in township 30 north, range 38, that it is not more valuable for the stone on it below the surface of the snow when you were there [236] than it is for anything else?

A. I think I can say that it is not valuable for stone, from what I saw.

Q. How could you see beneath the surface of three feet of snow, Mr. Davey?

A. Well, if there is any sufficient amount of stone it would be stuck up in some way so that you could have seen the outcrop, *whether* is snow on it or not. The general topography of the country was a general slope showing that the surface directly underneath was earth.

Q. Well, Mr. Schwartz saw a good deal of rock sticking up there, Mr. Davey?

A. Well, he probably saw a little, these little round boulders you are speaking of, something of that sort.

Q. He doesn't mention what he saw?

A. And this ridge.

Q. But he said it was very rocky.

A. This dike is the only visible rock that you can see. You can see that sticking out, and if there is any as plain as that, you could have easily noticed it.

Mr. MOSBY.—That is all.



(Testimony of W. R. Davey.)

Redirect Examination.

(By Mr. MACDONALD.)

Q. Now, to whom did you say that you turned over this sample to be assayed?

A. To the assayer Marsh—Richard Marsh, the assayer.

Mr. MACDONALD.—That is all. [237]

Mr. MOSBY.—That is all.

Witness excused.

**Stipulation [Re Testimony of Richard Marsh].**

It is stipulated between the parties that if Richard Marsh, the assayer, was present, he would testify that he received this sample from the witness W. R. Davey, and that he made an assay of it, and that the certificate marked Plaintiff's Exhibit 3 is his return of that assay.

(Here an adjournment was taken without day.)  
[238]

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[Endorsed]: No. 2146. United States Circuit Court of Appeals for the Ninth Circuit. Charles F. Allen and L. Ellen Allen, His Wife, Appellants, vs. The United States of America, Appellee. Original Transcript of Testimony. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed September 9, 1912.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

No. 2149

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# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ALASKA PACIFIC STEAMSHIP COMPANY,  
(a corporation),

*Plaintiff in Error,*

vs.

JOSEPH EGAN,

*Defendant in Error.*

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## TRANSCRIPT OF RECORD

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Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division.

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RECEIVED

JUN 12 1912

F. D. MONCKTON,  
CLERK.

FILED

JUL 1 - 1912





No. \_\_\_\_\_

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# UNITED STATES CIRCUIT COURT OF APPEALS

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*Plaintiff in Error,*

VS.

JOSEPH EGAN,

*Defendant in Error.*

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### **Names and Addresses of Attorneys**

HERBERT S. GRIGGS, Esquire,

No. 1115 Fidelity Building, Tacoma, Washington,

Attorney for Plaintiff in Error.

J. F. FITCH, Esquire,

No. 406 Bankers Trust Building, Tacoma, Washington, and

B. F. JACOBS, Esquire,

No. 406 Bankers Trust Building, Tacoma, Washington,

Attorneys for Defendant in Error.

**Stipulation for Transcript**

The defendant, plaintiff in error, waives any and all assignments or claims of error based upon the order and judgment of the trial court dismissing the suit against the defendant Sperry Flour Company, and

IT IS STIPULATED between plaintiff, defendant in error, and defendant, plaintiff in error, that the transcript of the record shall include only the following papers, to-wit:

1. Summons and Complaint.
2. Answer of Alaska-Pacific Steamship Company.
3. Reply to Answer of Alaska-Pacific Steamship Company.
4. Judgment of dismissal in favor of Sperry Flour Company.
5. Verdict.
6. Judgment against Alaska-Pacific Steamship Company.
7. Motion for new trial.
8. Motion to set aside former judgment and for judgment of dismissal against Alaska-Pacific Steamship Company.
9. Order overruling motions for new trial, and for judgment.
10. Bill of Exceptions with Order settling same.
11. All instructions given in full, and those requested by defendant Alaska-Pacific Steamship Company, and not given.
12. Petition for writ of error.

13. Order allowing writ of error.
14. Bond on appeal.
15. Assignment of errors.
16. Writ of error.
17. Citation in error.
18. Praecipe and Stipulation for Transcript.
19. All exhibits.

FITCH & JACOBS,  
Attorney for Defendant in Error.

H. S. GRIGGS,  
Attorney for Plaintiff in Error.

It is further stipulated that the Clerk in printing the record may omit from the various papers copied, as above agreed on, the heading and title of the cause, other than the description of the particular paper, also omit all endorsements on said papers of filing marks, service returns, verifications and receipts.

H. S. GRIGGS,  
Attorney for Plaintiff in Error.

FITCH & JACOBS,  
Attys. for Defendant in error.



JOSEPH EGAN,

Plaintiff,

vs.

ALASKA PACIFIC STEAMSHIP

COMPANY, a corporation,

SPERRY FLOUR COMPANY, a

corporation,

Defendants.

No. 1736.

**Summons**

THE STATE OF WASHINGTON, To the said Alaska Pacific Steamship Company and Sperry Flour Company, defendants:

You are hereby summoned to appear, within twenty (20) days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the Superior Court of the State of Washington for Pierce County aforesaid; and answer the complaint of the Plaintiff, and serve a copy of your answer upon the undersigned attorneys for Plaintiff, at their office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demands of the complaint, which will be filed with the Clerk of said Court (a copy of which is herewith served upon you).

FITCH &amp; JACOBS,

Attorneys for Plaintiff.

P. O. Address: 406 Bankers' Trust Building, Tacoma, County of Pierce, State of Washington.

### **Complaint**

Comes now the plaintiff and for cause of action against the defendants, complains and alleges as follows:

#### **I.**

That the plaintiff is a resident of Pierce County, Washington, and that the defendant Alaska Pacific Steamship Company is a foreign corporation organized under the laws of the state of Maine and doing business in the State of Washington, and that the defendant Sperry Flour Company is a corporation, organized and doing business under the laws of the state of California.

#### **II.**

That on or about the 10th day of December, 1910, the plaintiff was in the employ of the defendant, Alaska Pacific Steamship Company, and was engaged in assisting in the lading of a certain vessel belonging to said company, with flour at the plant of the defendant, Sperry Flour Company, on the water front of Tacoma Harbor in Pierce County, Washington. At which time the said steamship was lying at the wharf of the defendant, Sperry Warehouse Company, and held fast at the stern by a line reaching from the stern of the ship to a dolphin driven for said purpose about ten or twelve feet from the shore and immediately in front of the plant of said defendant, Sperry Flour Company, which dolphin was connected with the shore by a board or plank about two inches thick and twelve inches wide, and extending from one of the piles of



the dolphin to the shore, which dolphin was composed of a group of five piles, the center one of which projected about four feet from the surrounding piles and said dolphin and the plank connecting the same with the shore was a part of the plant of the defendant, Sperry Flour Company, furnished by said defendant for the use of ships while loading and discharging at its plant.

### III.

That at about 6 o'clock of the evening of said date, the plaintiff Joseph Egan was ordered by the foreman, under whom he was working to cast off the stern line of the ship from the dolphin hereinbefore referred to, and that plaintiff immediately proceeding to obey said order by crossing from the shore to the dolphin on the plank provided for said purpose, and that while plaintiff was in the act of passing from the shore to the dolphin upon said plank, said plank owing to being insecurely fastened slipped from the pile upon which it was resting and precipitated plaintiff together with said plank to the rock fill below, a distance of about twelve or fourteen feet.

### IV.

That at said time it was dark and plaintiff did not observe that said plank was insecurely fastened and did not know that the same was unsafe, but the fact that it was insecurely fastened and was unsafe and dangerous was well known and should have been well known to the defendants, and that said defendant, Sperry Flour Company, had care-



lessly and negligently constructed the same in an unsafe and dangerous position, and had carelessly and negligently allowed the same to become out of repair. And that the defendant Alaska Pacific Steamship Company had carelessly and negligently used said dolphin and the plank connecting the same with the shore, when the same was in a dangerous and unsafe condition, and dangerous for the use which it was put to, which danger was unknown to the plaintiff but well known, or in the exercise of reasonable care and inspection should have been well known to the defendants and each of them.

#### V.

That by reason of being precipitated from the said plank to the rock fill below as herein alleged, plaintiff was grievously and permanently injured, and made sick, sore and lame, and plaintiff suffered internal injuries, and plaintiff suffered a compound comminuted fracture of the lower end of the tibia, and a fracture on the lower end of the fibula of the right leg, and a fracture of the astragulas of the right ankle, and plaintiff has suffered a flattening of the arch of the foot. And plaintiff is advised and believes that said injuries are of a permanent nature and that thereby plaintiff has been deprived of the use of his right ankle, that his right foot has been made weak and painful, so that the same will prevent his walking up hill or climbing ladders, and will continually pain him as long as he may live.

#### VI.

That by reason of the injuries by plaintiff re-

ceived as herein alleged, he has suffered great physical pain and anguish and has been put to great expense for hospital fees, surgical and medical treatment, and is advised and believes he will be put to further and greater expense.

#### VII.

That plaintiff is by occupation a long shoreman and as such prior to the injuries by him received as herein alleged, was able to earn and did earn an average wage of \$4.00 per day, that by reason of the injuries by plaintiff received, as herein alleged he has been and is entirely incapacitated from performing any labor or earning any wage whatever, and plaintiff is advised and believes and alleges the truth to be that he will never again be able to work at his accustomed work, and will never again be able to earn more than a nominal wage in a very small amount.

#### VIII.

That by reason of the premises plaintiff has been damaged in the sum of \$5,000.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of \$5,000 together with his costs and disbursements in this action sustained.

FITCH & JACOBS,  
Attorneys for Plaintiff.

#### **Answer and Affirmative Defenses of Defendant Alaska Pacific Steamship Company**

Defendant Alaska Pacific Steamship Company for answer to the complaint of the plaintiff alleges as follows,



I.

It admits the allegations contained in paragraph I. of the complaint.

II.

It admits the allegations contained in paragraph II. of the complaint.

III.

It admits that at the time alleged in paragraph III of the complaint, the plaintiff, Joseph Egan, while assisting in casting off the stern-line of the ship from the dolphin referred to in paragraph III. of the complaint, fell; but this defendant alleges that it has no knowledge or information sufficient to form a belief as to the cause of the accident, or the reason why the plaintiff fell, and denies each and every other allegation, matter and thing contained in said paragraph III.

IV.

It denies each and every allegation contained in paragraph IV of the complaint, except the allegation that the defendant Sperry Flour Company has carelessly and negligently constructed the same (meaning the plank running to the dolphin) in an unsafe and dangerous position, and had carelessly and negligently allowed it to become out of repair, and as to said allegation this defendant alleges it has no knowledge or information sufficient to form a belief, except as hereinafter in its affirmative defenses set forth.

V.

It admits that the plaintiff was injured by the



accident suffered by him at the time set forth in the complaint, but denies any knowledge or information sufficient to form a belief as to the exact nature of plaintiff's injuries, and denies each and every other allegation, matter and thing contained in paragraph IV. of the complaint.

VI.

It denies any knowledge or information sufficient to form a belief as to any and all the allegations contained in paragraph VI. of the complaint.

VII.

It admits that the plaintiff was earning \$4.00 per day as a longshoreman at the time of the said accident referred to in the complaint, but denies each and every other allegation, matter and thing contained in paragraph VII of the complaint.

VIII.

It denies the allegations contained in paragraph VIII. of the complaint, and each and every part thereof;

And for its

**First Affirmative Defense**

This defendant alleges that the accident to the plaintiff and the injuries and damages which he suffered or will suffer by reason thereof, as set forth in the complaint or otherwise, were the result of and were wholly due to the ordinary risks and dangers of the occupation in which the risks and dangers were open, apparent and known to the plaintiff and were assumed by the plaintiff at the time he entered this defendant's employ and at the time of the

said accident, and were not due to the fault and negligence of this defendant.

### **Second Affirmative Defense**

This defendant alleges that the accident suffered by plaintiff and the damages and injuries which plaintiff received or will receive therefrom were due to the negligence of the fellow servants of the plaintiff, to-wit: to the co-employees of the plaintiff and the persons who together with the plaintiff were employed by the defendant in the same common employment and for the same general purposes, and were working together as co-employees and fellow servants at the time of the accident and were not due to the negligence of this defendant;

And for its

### **Third Affirmative Defense**

This defendant alleges that the dolphin and the plank connecting the same with the shore, and by which the same is reached as set forth in the complaint were part of the wharf and plant of the defendant Sperry Flour Company, and furnished by said Sperry Flour Company for the use of ships while loading and discharging at its plant, and constituted a part of the wharf of the said defendant Sperry Flour Company. That this defendant made use of the said wharf and its approaches and conveniences, including said dolphins, for the purpose of loading one of its vessels, to-wit: the Steam Ship "Admiral Sampson," at the said wharf and plant of the said defendant Sperry Flour Company, on the 10th day of December, 1910, the date alleged



in the complaint. That this defendant was requested and ordered, by the said defendant Sperry Flour Company, to load its said vessel at the said wharf or plant of the said defendant Sperry Flour Company, and was engaged in loading its said vessel, on the said date, at the said wharf and plant of said defendant Sperry Flour Company, in pursuance to the said request and contract therefor with and from said defendant Sperry Flour Company. That the said wharf and plant, appurtenances and conveniences, were maintained by the said defendant Sperry Flour Company as a wharf for the benefit of ships while loading and discharging at its plant, and this defendant had reason to believe and did believe at all times that the said wharf and plant, and appurtenances and conveniences were being maintained in a good and safe condition and there was nothing to indicate to this defendant that the said wharf and plant, or the said dolphin and its approaches, were not in a good and safe condition; that the plaintiff had the same opportunity for knowing and ascertaining the condition thereof as did this defendant, and that if the said dolphin and the plank connecting the same with the shore were out of repair for any reason whatever, that fact was unknown to this defendant, and this defendant was not responsible for the same, but the defendant Sperry Flour Company was and is the person solely and wholly responsible therefor and for the damages which have been or will be suffered by the plaintiff by reason thereof.



WHEREFORE, this defendant prays that this action may be dismissed as against it, and that it have its costs and disbursements herein; and that if the said wharf and appurtenances and conveniences are found and ascertained to have been defective and out of repair, as in the complaint stated or otherwise, that the responsibility therefor and any damage the plaintiff has suffered thereby be adjudged to rest upon the defendant Sperry Flour Company, solely, and not upon this defendant in whole or in part.

HERBERT S. GRIGGS,

Attorney for Defendant,

Alaska Pacific Steamship Co.

Office and Post office address: 912-14 Fidelity Building, Tacoma, Washington.

### **Reply**

Comes now the plaintiff and for reply to the answer of the defendant Alaska Pacific Steamship Company, replies as follows:

#### **I.**

Plaintiff denies each and every allegation contained in first affirmative defense set forth in said answer.

#### **II.**

Plaintiff denies each and every allegation contained in the second affirmative defense set forth in said answer.

#### **III.**

As to the allegations contained in the third affirmative defense set forth in said answer, beginning with

the beginning of said defense, through and including the words "said dolphins and its approaches were not in good and safe condition" says that he had no knowledge or information sufficient to form a belief, therefore denies each and every part thereof, except that part which alleges that said wharf, dolphin and appliances were furnished as in said affirmative defense alleged by the Sperry Flour Company for use in the lading and discharging of ships at the plant of said defendant Sperry Flour Company; as to their further allegations in said affirmative defense plaintiff denies the same and each and every part thereof.

Wherefore plaintiff prays judgment as prayed in his complaint.

FITCH & JACOBS,  
Attorneys for Plaintiff.

**Order and Judgment as to Sperry Flour  
Company**

Came on this cause for trial on this 28th day of September, 1911, the plaintiff appearing in person and by his attorneys, Fitch & Jacobs, the Alaska Steamship Company appearing in person and by H. S. Griggs, its attorney, and the Sperry Flour Company appearing in person and by its attorneys, Hayden & Langhorne. A jury of twelve persons was regularly and duly impaneled and sworn to try the issues in said cause.

After introduction of testimony on the part of the plaintiff, and after the plaintiff, by his attorneys,



announced that he had rested his case, the defendant Sperry Flour Company moved the Court for a judgment in its favor.

After argument of counsel, the Court being duly advised, IT IS ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby sustained.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, IT IS ORDERED, ADJUDGED AND DECREED, that this action be and the same is hereby dismissed as to the Sperry Flour Company, a corporation, and that the plaintiff take nothing thereby, and that said defendant, Sperry Flour Company, have judgment against the plaintiff as to its costs and disbursements in this action.

FRANK H. RUDKIN, Judge.

### **Verdict**

We, the jury empanelled in the above entitled case, find for the plaintiff, and against the defendant Alaska Pacific S. S. Company, and assess his damages at the sum of Four Thousand Dollars (\$4000.00).

WILLIAM M. KENNEDY, Foreman.

### **Judgment**

This cause coming on regularly for trial in open Court on the 28th day of September, 1911, before Hon. Frank. H. Rudkin, Judge, and a jury, plaintiff being represented by Fitch & Jacobs, his attorneys, and the defendant, Alaska Pacific Steamship Company, a corporation, being rep-



resented by H. S. Griggs, Esquire, its attorney, and the defendant, Sperry Flour Company, being represented by Hayden & Langhorne, its attorneys, and evidence having been introduced by the plaintiff in support of his cause of action, and the plaintiff having rested his case, and a motion for a non-suit having been presented on behalf of the defendant, Sperry Flour Company, and on behalf of the defendant, Alaska Pacific Steamship Company, and said motion, after argument, was granted as to the defendant Sperry Flour Company, and by the Court overruled and denied as to the defendant, Alaska Pacific Steamship Company, whereupon evidence was introduced on behalf of defendant, Alaska Pacific Steamship Company, and after argument of said cause to the jury by the attorneys for the plaintiff and the attorneys for the Alaska Pacific Steamship Company the jury did on said day retire to deliberate of their verdict, and presently returned into Court with a verdict in favor of the plaintiff and against the defendant, Alaska Pacific Steamship Company, for the sum of Four Thousand Dollars (\$4000.).

Wherefore it is by the Court considered adjudged and decreed that the plaintiff Joseph Egan, do have and recover judgment against the defendant, Alaska Pacific Steamship Company for the sum of Four Thousand Dollars (\$4,000) together with his costs in this action sustained to be taxed as provided by law and the practice of this Court.

FRANK H. RUDKIN, Judge.

### **Motion for New Trial**

Comes now the defendant Alaska Pacific Steamship Company, and not waiving its motion for judgment of dismissal, and moves the Court for an order granting new trial in the above entitled cause for the following reasons:

#### **I.**

Misdirection by the judge of the jury in that the instructions as given contained an improper statement of the law, all as heretofore duly excepted to.

#### **II.**

Misdirection by the judge of the jury in that the judge failed to give certain instructions requested by this defendant, and for the refusal to give same, to which this defendant duly excepted.

#### **III.**

That the verdict is contrary to the evidence.

#### **IV.**

That the verdict is contrary to law.

#### **V.**

Error of the Court in failing to grant this defendant's motion for non-suit made after plaintiff had closed his case.

H. S. GRIGGS,  
Attorneys for Defendant Alaska Pacific  
Steamship Co.

### **Motion**

Comes now the defendant Alaska Pacific Steamship Company, and moves the Court for judgment dismissing the above entitled cause, and setting aside



the verdict and judgment therein heretofor entered and rendered, for the following reasons:

I.

That at the conclusion of the plaintiff's cause, the evidence failed to show any negligence whatsoever on the part of the defendant Alaska Pacific Steamship Company, and because said evidence did show that the plaintiff had been guilty of contributory negligence, and that the accident to plaintiff was occasioned as the result of dangers which the plaintiff had assumed.

II.

Because the evidence in the case was entirely insufficient to prove any negligence on the part of the defendant which contributed to plaintiff's injuries as the direct and proximate cause of them.

H. S. GRIGGS,

Atty. for Alaska Pacific S. S. Company.

**Order Overruling Motion for New Trial and  
for Judgment Notwithstanding  
Verdict**

This cause coming on regularly for hearing in open Court on this 11th day of December, 1911, upon the motion of the defendant, Alaska Pacific Steamship Company for a new trial and for judgment notwithstanding the verdict in the above entitled cause, and the Court having heard argument of counsel and being fully advised it is by the Court considered adjudged and decreed that said motions be and the same are hereby overruled and denied.

Said defendant then asked for sixty days in which



to settle a statement of facts and bill of exceptions in the above entitled cause, which time was allowed.

FRANK H. RUDKIN, Judge.

### **Bill of Exceptions**

This is an action at law by the plaintiff to recover damages from the defendants for personal injuries received by the plaintiff while in the employ of the Alaska Pacific Steamship Company and working on and about the wharf of the defendant Sperry Flour Company in Pierce County, Washington. The cause came on regularly for trial on September 27th, 1911, before the Honorable F. H. Rudkin, Judge of the above named Court. Plaintiff appeared in person and by his attorneys, Fitch & Jacobs. The defendant Alaska Pacific Steamship Company appeared by its attorney, Herbert S. Griggs, and Defendant Sperry Flour Company by its attorney, Hayden & Langhorne. The jury having been duly impanelled, the following proceedings were had and testimony taken:

### **Plaintiff's Evidence in Chief**

Dr. Wilmot D. Reed, witness for plaintiff, was duly sworn and testified as to the nature and extent of the injuries sustained, but as no question is made as to their extent or the amount of damages awarded, said testimony is omitted.

### **Testimony of William F. Brady**

William F. Brady, a witness for plaintiff, having been sworn, testified as follows:

"My name is William F. Brady; I live at 4819 South Yakima Avenue; am a stevedore and boss

(Testimony of William F. Brady.)

longshoreman by occupation; have been so engaged for about five years; have been longshoreman in Tacoma Harbor a little over eleven years. I was boss longshoreman in charge of the Admiral Sampson on the night of December 10th, 1911. Mr. Egan was one of my employees under my direction. Every time a steamer loads at the Sperry Mill Company's wharf in Tacoma Harbor, we have to make the steamer fast to the shore dolphins along the shore in front, putting forward and aft lines on the dolphins along the shore and spring lines on the dolphins at the wharf at the end of the shutes. There is a board from the shore that lays on the shore and out to the dolphins, which is the way you get out to them."

At this point it was admitted that the dolphin shown in photograph marked "Exhibit E," the largest of the photographs introduced by plaintiff, is the dolphin opposite the plant of the Sperry Mill Company and from which Egan fell, and it was agreed also that photographs "A," "B," "C," and "D" were different views of the shore dolphins in front of the Sperry Mill plant, and the same were received in evidence without objection.

Witness then continued, testifying as follows:

"These dolphins stand some of them about fifteen feet from the shore and some not more than nine or ten feet. I think that the dolphin shown on Exhibit "E" must be ten or eleven feet from the shore. The shore at that point adjacent to that dolphin is



(Testimony of William F. Brady.)

a kind of sea wall built of rock, the rock extending plumb down to near the foot of the dolphin—that is at low tide as far as the beach. The dolphin stands out a little from the shore, probably ten feet. The wall is pretty straight down there, nearly straight, so that it would not reach to the foot of the dolphin but down to the beach on a line with the end of the telephone. There are some large rocks lying around there on the beach. About ten minutes past five, toward the end of December, 1910, we finished the loading of the Admiral Sampson at the mill. At that time I had Egan down in the hold looking after the rigging, and one thing and another, on the steamer. He was looking to see that the wheat was properly loaded. After we finished loading with wheat the steamer was going to pull over to the Tacoma Grain Company for a load, so I sent the gang for their supper and I told Mr. Egan and a gentleman by the name of Rickter to let the lines go there, to throw off the lines and to go over to the Grain Company and take them in there when she landed there. I did not sent Egan and Rickter to any particular line. I told them to throw the lines off. They understood that themselves, and when I told them to take the lines off, one goes to one line and the other to the other. I am referring to the bow line and the stern lines, one at each end of the ship, and which fastened to one of the shore dolphins. I could not see which line Egan went to, but he must have gone to the forward line (pointing to it as shown on Exhibit A). When



(Testimony of William F. Brady.)

I sent him to throw off the line, I went back to the aft hatch and went to straightening up some things. I had quite a bit of them to get straightened out and I kept hearing them hollering around or some one talking about putting a bolt over the side. I did not pay any attention to it, and when I came on deck I heard some of the men had got a broken leg, and when we landed close to the Tacoma Grain Company's dock a fellow by the name of Sam Swanson said "Joe Egan is down here with a broken leg." Now here is where the steamer would be laying (pointing to Exhibit "E") Egan would go ashore here from the steamer and out here is where the wharf runs. He would have to go out on that wharf and along the shore and walk out here on this board to the dolphin and throw the line off. The use of the dolphins is to make the ship fast to; to hold the ship in place while it is loading. They are necessary for the tying up of any ship at the Sperry Mill dock."

At this point it was admitted by counsel for all parties that there was no other means for the ship to be tied up to the wharf except by the use of these dolphins.

Witness continuing:

"There was no other means furnished for Mr. Egan to go out on this dolphin except by means of the plank. That is the means employed for throwing off and putting on the lines."

(Testimony of William F. Brady.)

CROSS-EXAMINATION BY MR. LANGHORNE.

“Egan was hired by me. I was in the employ of the Alaska Pacific Steamship Company, and hired Egan to work for that company. It was about 3 o'clock on December 10th, when the Admiral Sampson tied up at the wharf between three and four. Egan was there at the time when she tied up and helped tie her up. I do not remember which line he helped to tie. I have been boss longshoreman for five years and have known Egan probably eleven years. He has followed longshore work during all that time. I have often seen him around the plant of the Sperry Flour Company on the steamers. He has often worked around there, helped loading the ships. Mr. Egan has helped me many times for the last year and a half loading ships at the Sperry Flour Company. It would be hard to say how many times, but quite a few times. During all that time these dolphins, and the particular one shown on ‘Exhibit E,’ has been in the same position so far as I know. I never notices any changes in it to indicate it was in any other condition at the present time than it was on December 10th, or theretofore. During all that time they used a plank in going to and from the dolphin, such as is shown in Exhibit ‘E,’ or something similar to it, laid in the same way as shown in that picture; practically the same from the shore right out on the dolphin. I do not know who laid the plank there on December 10th. It had been lying there ever since the ship moored up to



(Testimony of William F. Brady.)

the wharf about 3 o'clock. During that afternoon Egan was down in the hold of the ship showing the fellows how to sort the wheat, see that it was sorted properly, looking after the rigging, and so on. He was doing this from the time we started work at the Sperry Mill. He received the same wages as the other men, but generally, when I went to the mill I kept an extra man there. I had to go up to the mill and quite a bit around. While I was gone I looked to him to look after the work, knowing him to be an experienced man at that work. About ten minutes after five we got ready to cast the line off and I told Egan and Rickter to go and cast the line off. I did not tell them where to go, that is which one was to go to the bow line and which to the stern line. I just told them to throw off the lines. At that time the tide was pretty low. I could not say whether it was running out or not, but it was low tide. It might have been flowing out and it might have been on the stand-still at the time. We were going up to the Tacoma Grain Company as quick as we cast off. The ship was prepared and the machinery of the ship was getting ready to move. I could not say whether it was in actual motion or not. At the time I sent Egan to throw off the line the signal had not been given to move. When the lines were thrown off, or when one line was thrown off, it would cause some motion of the ship, and if the line that Rickter had, was cast before Egan cast his off, there would be some movement—that is the



(Testimony of William F. Brady.)

ship would certainly move a little bit; it would probably swing a little bit. When I gave these orders to Egan and Rickter, I was standing on board the steamer and do not remember whether I could at that time see the dolphin from where I stood. The days began to get a little bit dark at that time. I do not remember now whether it was too dark to see the dolphin or not. The dolphin was probably 300 or 350 feet away. When a person got to the shore line under the conditions as I have described them, he could usually see the dolphin I suppose and could probably see the plank. I could not say whether he could see its condition, or anything like that, because it was getting a little dark. Egan went right straight to obey my order. I would not say whether I could see the dolphin from where I was about 350 feet away. I probably could see it if I had been on the short within eleven feet of it. The dolphin is for the ship to tie to, to keep the ship in a stationary position, because the ship at times will surge back and forth a little. That tightens the line and probably causes a pull on the dolphin to some extent."

CROSS-EXAMINATION BY MR. GRIGGS.

"When the ship came into the wharf, the lines were made fast to both of the inshore dolphins. Mr. Wright and Mr. Thurston and Mr. Egan made the lines fast. None of them made any report to me as to anything about the plank being unsafe or not in proper condition. As boss longshoreman I had often made fast and unfastened, myself, the lines to these

(Testimony of William F. Brady.)

same dolphins. All the dolphins down there are pretty nearly the same as shown in this picture Exhibit 'E,' except for varying distances. The perpendicular distance from the plank down to the foot of the dolphin when the tide was out, that is the dolphin shown on Exhibit 'E,' is about 11 feet. The plank to this dolphin, I should say, was about 10 inches wide. I had not been on this particular plank that day. The only person that had been on it so far as I know were the men I sent out, Egan and the two other men, to make the line fast. There was no other way of making any practical use of these dolphins in order to make the ships fast to them except by some such contrivance, as this plank. Of course a man might shin up the dolphin if he was a good climber. Mr. Egan in the years I had known him, had had experience along all the lines and duties of longshoreman. He knew it from one end to the other; all the duties of longshoreman, including the handling of these lines, fastening and unfastening them, etc. He should know it a little better than I as he has been here longer. I think he has been here about 20 years."

RE-DIRECT EXAMINATION BY MR. JACOBS.

"The planks lying out on these dolphins have been there every time I have seen them; all the time."

RE-CROSS-EXAMINATION BY MR. LANGHORNE.

"I say the boards or planks have been there just about the same since I have noticed them. That is



(Testimony of William F. Brady.)

I mean I have seen them there from time to time—that is when the ships were there and also when the ships were not there. I do not know who put this plank up there. I never put any planks out to the dolphin from the shore. There are what are called shore dolphins which are these close to the shore. Then there are other dolphins out here (pointing to the Exhibit). We have shutes on those because they have not boards on them. Boards could be put there, but they do not seem to stay there very long. I never tried any contrivance that would stay very well, and so far as I know nobody else has ever tried it. All these dolphins have been used in just that way all of these years as far as I know. I supposed a man with the long experience of Mr. Egan knew just what he was doing. I want to be and am fair about this matter. I don't know whose plank that was."

RE-CROSS-EXAMINATION BY MR. GRIGGS.

"Besides the ships of the Alaska Pacific Steamship Company there are quite a few other lines of steamers that land at the Sperry Flour Company's wharf and take cargo. The Pacific Coast line, The Dowdell line, the Blue Funnel line, and two Jap lines. All of these steamers that land there have to make use of these dolphins just as we did."

### **Testimony of Ernest Rickter**

Ernest Rickter, a witness produced by plaintiff, having been sworn testified as follows:



(Testimony of Ernest Rickter.)

"I have been longshoring in Tacoma four and a half to five years; was longshoring December 10th last, working for Mr. Brady, and was down at the Admiral Sampson the night when Joe Egan was hurt. I was one of the men sent to throw off the lines. I threw off two spring lines and also the stern line. This occurred just a little after five o'clock. It was dark. I was working under Mr. Brady's direction employed by the Alaska Pacific Steamship Company. I am pretty familiar with these other dolphins. They are used to tie the lines of the ship fast to. To get out to the dolphins to put a line on or take it off, they have a board running from the shore up to the dolphin. The boards are not part of the dolphins. They are laying on the bank, on the rocks, and on the dolphins, just laying loose there."

"Q. To the dolphin?"

"A. They have been tied sometime ago, but they have been lose a long time after that."

"Q. They have been tied sometime before?"

"A. Oh, yes, sir."

"Q. But some of them had come loose?"

"A. Yes, sir, had a piece of wire over it and tied so that they could not slip off the dolphin."

"Q. Tied so that they could not slip on the dolphin?"

"A. Off the dolphin."

"Q. Off the dolphin?"

"A. The end on shore never was tied."

(Testimony of Ernest Rickter.)

“Q. The end on shore never was tied?”

“A. No, sir.”

“Q. How much spring ought there to be in that dolphin?”

“A. Well, sir, all depends. When the ship holds the line tight the dolphin goes over to the ship. The dolphin is loose. When the ship holds the line tight the dolphin is shaken, and the plank is even with the shore.”

“Q. That is if the board is fastened to the dolphin?”

“A. Yes, sir. I don’t know how long that board is, 10 or 12 feet. I do not know how long.”

“Q. The dolphins are all fixed that way are they?”

MR. LANGHORNE: I object to that.

THE COURT: Objection sustained.

“Q. Any other way to get to the dolphin except by means of this plank?”

“A. There is no other way to get to its unless the man could shin from the bottom up. If there is low water the man can get to it and shin from the bottom up.”

“I knew Joe Egan at the time he was hurt; worked around with him before in the same gang. I have taken the lines a couple of times from the dolphin from which Joe Egan fell. From the plank down to where Egan fell on the rocks I would figure to be about 20 feet. Joe was working in the same gang with me at that time.”



(Testimony of Ernest Rickter.)

CROSS-EXAMINATION BY MR. LANGHORNE.

"This is the line that Joe Egan threw off (pointing to Exhibit E). I threw the line off on that side of the elevator (pointing to photograph). That is the line at the Puget Sound Flour Mill, or the next dolphin to the Puget Sound Flour Mill. This is the bow line and the other is the stern line (pointing to Exhibit E). I went to the first dolphin over towards the Puget Sound Flour Mill. I did not go above the elevator shaft shown there, but went along the dock and got to the shore. I got off the dock and came down here (indicating on photograph). I went on to the dolphin from which I threw the line off from the shore side. I walked the plank out to it. I saw the plank on which I walked by I had to strike a match to do so."

"Q. You struck a match did you?"

"A. Yes, sir."

"Q. You took that precaution?"

"A. Yes, sir."

"Q. You wanted to be entirely safe about it didn't you?"

"A. Of course I been taking quite a few lines there before, and the plank was got like this before."

"Q. It was a little after five o'clock wasn't it?"

"A. It was after five o'clock, yes, sir."

"Q. Lights of the steamer lit?"

"A. I threw the line out and went over to the other dock."

"Q. Were the lights of the steamer lit?"



(Testimony of Ernest Rickter.)

“A. They got very few lights; you cannot see nothing from the steamer up to the dock.”

“I am not a great friend of Joe’s, nor of anybody. I am my own friend as far as that is concerned. I haven’t had a drink this morning. I have been in the hospital quite a while.”

“Q. That picture shows the condition in which that dolphin and plank had been for a long time?”

“A. That plank did not lay on the dolphin. That plank lay on the wire strap.”

“Q. But where is the wire strap?”

“A. The wire strap used to be there before.”

“Q. How long before was there any wire strap there?”

“A. I do not know how long ago.”

“Q. Did you ever see any wire strap on that in your life?”

“A. Yes, sir, I did.”

“Q. On that one?”

“A. Yes, sir.”

“Q. How long was it before the injury to Egan?”

“A. Well, sir, I could not tell you, I do not remember, but I remember I had taken the line off and the plank was laying on the wire strap, and fastened over with the wire strap.”

“Q. Had you seen the wire there a month prior to the injury?”

“A. Well, sir, I saw the wire there before.”

“Q. How long before the injury?”

“A. I could not tell you.”

“Q. Would you give us any idea?”

“A. Might be a year, and might be a year and a half.”

(Testimony of Ernest Rickter.)

“Q. How many times have you and Joe worked around there since a year and a half ago?”

“A. Me and Joe never took a line off of there since that time.”

“Q. How often have you worked around that dock down there?”

“A. I have been around the ships nearly all the time.”

“Q. Anybody could have seen the wire around there?”

“A. I have seen the wire there a great many times.”

“Q. If the wire had been taken off a year and a half before anybody that looked at it could see that it had been taken off?”

“A. I do not know. When a man goes to work he has to hurry up to get this line off and he has not much time to look around.”

“I got my line off before Joe. The man was hurt before he threw off his line and I went on my dolphin. I threw it off and went over to the Tacoma Grain and stayed there about 20 minutes and I hollered for Joe Egan. I could not find Joe and went back, and when I got back the mate said the man who threw off the forward line fell down and broke his leg. I do not know whether the ship moved when I let my line go. I waited on the other dock for 20 minutes and did not see it move. When I saw the ship did not move I thought there was something the matter.”

(Testimony of Ernest Rickter.)

“Q. You could see the ship did not move?”

“A. I could not see the ship coming up to the dock.”

“Q. When you let off your line you could see that the ship did not move?”

“A. It did not move at all.”

“Q. And you had to strike a match to get over the plank?”

“A. Yes, sir.”

CROSS-EXAMINATION BY MR. GRIGGS.

“I threw off the port stern line. I had not fastened it, nor either of the lines that afternoon. I worked with Egan five or six years, five years on the beach doing the same kind of work along with all the other men around the beach, but I did not work with him every day; only once in a while off and on.”

### **Testimony of Joseph Egan**

Joseph Egan, the plaintiff, being sworn testified as follows:

“My name is Joseph Egan; reside at Fern Hill; by occupation a longshoreman; have been longshoreman in and about Tacoma Harbor 22 years; February 3rd next, I will be 49 years. I am a married man. On December 10th last I was working on the Alaska Pacific Steamship Company's boat the Admiral Sampson. My foreman was Mr. Brady. I was doing all kinds of work there, the same as the rest of the men.”

“Q. Were you sent to throw off the bow line of that ship?”



(Testimony of Joseph Egan.)

"A. Yes, sir, as near as I could understand I was ordered to let go the bow line."

"Q. What did you do in obeying that order?"

"A. I went along the way they have got there, right along on the jetty I should call it."

"Q. I will show you exhibit 'E' and ask you what you refer to, where did you start to walk along?"

"A. Along here from the ship's side, the only way I could go along."

"Q. Along the walk?"

"A. Along here on to this corner there, and then I come along careful enough, because it was dark. I came along the track here till I got abreast of this board here, and of course they were waiting when I got the order to let go the line, and I goes on this board with the intention of letting go of this line, with the of going back to the shore again."

"Q. Your intention was to go to the dolphin was it?"

"A. Yes."

"Q. What happened?"

"A. The board turned and dropped down, me and the board together."

"Q. And where did you go?"

"A. Well I brought up in the rock pile below with a broken leg. I have got it here to show it."

"I was getting 40 to 50 cents an hour, an average of about \$100 a month. It was quite dark when I went along there. I never knew any other way to get to these shore dolphins, except to go along the plank. If I can remember right, it seems to me that

(Testimony of Joseph Egan.)

the plank was about 2 inches thick and ten inches wide. Probably 12 feet long."

"Q. About where were you on the plank when you fell, how far from the shore and how far from the dolphin?"

"A. Well it is quite a good while ago, but as near as I can recollect I made a step this way (illustrating), with the right foot, and I got the other foot on the other side, and the plank instantly tipped and dropped quicker than I can tell you about. I went. I did not have time to think about anything."

"Q. You were two or three steps from the shore?"

"A. About three steps on the plank."

"Q. Where did you strike?"

"A. I struck the bottom, the rocks in the bottom of the beach."

"Q. And you were then taken to the hospital?"

"A. Yes, sir. There was nobody there at all. I was alone. There was nobody around there anywhere near me at all?"

"Two railroad men on the switch engine took me up. I was put in the hospital and was there eight weeks."

"Q. Was there any other way for you to get to that dolphin?"

"THE COURT: He has testified not, as I recall it."

"Q. You are familiar with the other dolphins along the Tacoma water-front generally, are you not?"

"A. Yes, I have seen them a good many times."



(Testimony of Joseph Egan.)

“Q. How are they connected up with the shore?”

MR. LANGHORNE: “We object to that as immaterial.”

CROSS-EXAMINATION BY MR. LANGHORNE.

“I have been longshoring about 22 years. I could not say how many times I have been around the Sperry Flour Company’s plant. Lots of them that have worked there have been around there longer than I have. I want to tell as near the truth as I can about this. There are lots of men that have been there oftener than I was there, because I was not all the time working for the Alaska Pacific Steamship Company. Many times I used to work for the Alaska Coast Steamship Company on the other side. Oh, yes, I had been around there many times. The last time I was there prior to December 10th, I think must have been six weeks or may be a couple of months before. I had not to my knowledge passed over this dolphin before. I might have done so, but I am sure I have not recently.”

“Q. You passed out to other dolphins about like this one hadn’t you?”

“A. Yes, just the same thing, sir.”

“Q. You passed to the one just above the plank, the one that Rickter went to?”

“A. Passed by that, —”

“Q. You had passed out to it many times before?”

“A. I had been on that one the same day.”

“Q. And it had about the same kind of plank on it that this one had, hadn’t it?”



(Testimony of Joseph Egan.)

“A. They all look pretty much the same, pretty near.”

“Q. They all look pretty much the same don't they?”

“A. Yes.”

“Q. You knew that laid up on the dolphin with the end loose didn't you?”

“A. Sure thing.”

“Q. Both ends?”

“A. No, I did not know that.”

“Q. You knew the one down below?”

“A. I supposed that end was fast and secured sufficient for me to go out to let go this line and go back with ordinary care, and safely get back to the shore.”

“Q. The one above was not fastened was it?”

“A. Which one?”

“Q. The one you were on that day?”

“A. I do not know positively whether it was or not.”

“Q. You didn't even look to see about that?”

“A. It was daylight at that time.”

“Q. It was day-light at that time?”

“A. I could possibly see it from the end if I had gone to the other end.”

“Q. It was not fastened was it?”

“A. I could not say positively whether it was or not.”

“Q. You do not remember that. Was there any of these planks at the plant of the Sperry Flour Company fastened to the top of the piling?”

“A. There is none fastened to the top of the

(Testimony of Joseph Egan.)

piling, I hardly think. The most of them are fastened down on bands that goes around, a wire band, and most of them is wired onto that."

"Q. Look at that photograph. Is there any wire shown on that?" "A. Yes, sir."

"Q. Where?"

"A. Right down at the water's edge."

"Q. I know, but the plank didn't rest down there, did it?" "A. No, it rested on the top of the piles."

"Q. Rested up on top of the piles?" "A. Yes."

"Q. You were there during the day?"

"A. I never was on that during the day."

"Q. You were there to the plant of the Sperry Flour Company during the day?"

"A. I was, yes."

"Q. You had been there many times before?"

"A. Yes, I could not say but what I was there."

"Q. You were in the employ of the Alaska Steamship Company weren't you?" "A. Yes."

"Q. And you received your orders from the foreman of the Alaska, —"

"A. That is what I did."

"Q. You were not in the employ of the Sperry Flour Company?" "A. No."

"The Sperry Flour Company gave me no orders. It was somewhere between five and six o'clock when Mr. Brady ordered me out on the plank. I had not yet gone to dinner, or rather supper. The rest of the men went. I went along the conveyor board or the shaft rather; I don't know what you might call

(Testimony of Joseph Egan.)

it, and went around the corner along the railroad track to this plank. The railroad track is laid right back of the plank. I could see the dolphin. You cannot see the plank where you can see the dolphin, which is so much larger, in the dark. I could not say positively at that time whether you could see the dolphin from the ship, nor could I say how far away I could see the dolphin. I do not know."

"Q. You got out on it you say about three steps when it fell?" "A. A couple of steps I think."

"Q. It tilted over?" "A. It tilted and, —"

"Q. Tilted in the middle?"

"A. From the end, from the dolphin end."

"Q. I thought you said it tilted and threw you sideways?"

"A. It tilted and we went together, the plank and me dropped together at the same time. The drop was quick. I do not know just how quick I did drop, the plank with me."

"Q. You do not know whether Rickter had thrown off the line above do you?"

"A. I could not see; it was dark, I could not see for that distance. A quarter of that distance I could not see."

"Q. You think you could see a quarter?"

"A. Maybe I could see 100 feet as far as throwing the line off was concerned."

"Q. Now dolphins of course are to tie the ships up to to keep them stationary aren't they?"

"A. Yes, sir."



(Testimony of Joseph Egan.)

“Q. And the lines sometime tighten on the dolphins,—doesn’t it?”

“A. I could not say that they do. I could not say that they do not.”

“Q. You have had 22 years experience?”

“A. I could not say; I would not swear to that positively what they do do. That is not part of my business at all to watch whether they do or whether they do not.”

CROSS-EXAMINATION BY MR. GRIGGS.

“I have seen ships come in and lines made fast to the dolphins and the ship warped into position alongside of the wharf. Sometimes the ship is pulled into position with the spring lines. They make use of any of the lines that are necessary for that purpose, sometimes with the spring lines and using the propeller. If they have to do it, they do it. I have seen them do that time and time again. I was there when the boat came in and went out, and made fast one of the stern lines. That was the opposite line to the one I let go.”

“Q. Are you prepared to say now whether you noticed anything particular about the condition of the plank?”

“A. That plank looked to me, —”

“Q. Do you remember?”

“A. It was day-time. I could see everything I did. I could see that plank on that end the same as I could see on this end, and it looked secure enough to me to go out there and help put the lines on. An-

(Testimony of Joseph Egan.)

other man was along with me. We were both on, not only one but two."

"Somebody else made fast the bow line. It was Mr. Thurston. He is right here (indicating in the court room). I can not say that I have seen Brady use these lines, or not. He may have done so, but I can not say positively I ever saw him do it. I have seen him handle the spring lines, but I do not remember I ever saw him go out to the shore dolphins. If it is necessary to take a pull on it he would do so. When he told Rickter and me to cast off the lines, he asked me if I can remember aright, if there was anybody else there. I do not remember what the name was. I told him they had all gone ashore. I was the only man there. He says, 'Well, Joe you had better stay and help with the line.' I says, 'all right.' He says you can go to your supper after we get her up to the other dock and have her fast, you can go and have your supper.' I do not remember whether I was just going over the ship's side or on the dock. I remember the words. I was trying to obey orders."

### **Testimony of John Doyle**

John Doyle, witness for plaintiff, being duly sworn, testified as follows.

"My name is John Doyle; am a watchman by occupation; 47 years old; residence in Tacoma for the last 24 years. I know Joe Egan. I seen him on the water front and remember finding him down on the hill or beach there December 10th last. A little boy came and told me a man had fallen overboard. I



(Testimony of John Doyle.)

took my lantern and looked down in there and saw a man lying down on the rocks. A man by the name of Olson and I went around and got down on the beach and went over and found Egan lying there, and he was groaning. We got him on our backs and carried him up and put him in the Sperry Flour Mill engine room, the fire room."

Thereupon, through his attorneys Fitch & Jacobs, plaintiff rested.

### **Motion for Non-Suit and Judgment of Dismissal, Etc.**

Thereupon defendant Sperry Flour Comapny, by its attorney Mr. Langhorne, moved the court for non-suit and judgment of dismissal on the grounds that

First, No actionable negligence had been proven against the company;

Second, that the testimony conclusively showed the plaintiff assumed the risk of injury when he attempted to walk the plank.

Third, The evidence conclusively showed he was guilty of contributory negligence.

Thereupon defendant Alaska Pacific Steamship Company by its attorney Mr. Griggs, moved for non-suit and judgment of dismissal upon the following grounds:

First, that no actionable negligence had been proven against that company.

Second, that the testimony conclusively showed plaintiff assumed the risk of injury when he attempted to walk the plank.



Third, the evidence conclusively showed he was guilty of contributory negligence.

Fourth, that the evidence failed to show why or because of what particular defect the plank fell, and the evidence does show affirmatively that the Alaska Pacific Steamship Company had no knowledge that the plank or its fastenings, or the approach to the dolphin was in a defective condition in any particular, but was informed by actual use of the plank in the ordinary way two hours before this accident that it was in a reasonably safe condition.

Fifth, that the Alaska Pacific Steamship Company had no knowledge, either actual or constructive, of any defective condition in the plank or the approach to the dolphin, which would make the defendant responsible for the accident that did happen or the damages that plaintiff suffered thereby.

Sixth, the company further specially objected to the discharge or dismissal of its co-defendant in the case, Sperry Flour Company, for the reason that if the evidence showed any negligence whatever, the Sperry Flour Company was responsible for the damages suffered by plaintiff thereby as between the Sperry Flour Company and the Alaska Pacific Steamship Company. That the Alaska Pacific Steamship Company had the right to assume that the appliances which the Sperry Flour Company turned over to them and which were on their premises, were in a reasonably safe condition, and if they were not in a reasonably safe condition and if plaintiff had suffered damages thereby, the Sperry

Flour Company was responsible therefor and was under obligation to protect the Alaska Pacific Steamship Company from any judgment which might be recovered against the Alaska Pacific Steamship Company in this case.

Thereupon after discussion the court made the following ruling:

“I am absolutely convinced that there is testimony from which the jury would be warranted in finding that this plank was not reasonably safe, and that its condition could have been discovered by the exercise of reasonable diligence on the part of the Steamship Company, and as to it the motion for non-suit will be denied, but I confess I cannot find any testimony here which would warrant me in submitting the case as against the Sperry Flour Company. I will grant the motion as to the Sperry Flour Company and deny it as to the Alaska Pacific Steamship Company.”

Exception to this ruling was taken by the Alaska Pacific Steamship Company by its attorney and allowed, and exception to the ruling dismissing the case as to the Sperry Flour Company was taken on the part of plaintiff and allowed.

Thereupon the court instructed the jury that a non-suit had been granted as against the Sperry Flour Company, and that they were only to consider the issues as against the Alaska Pacific Steamship Company.



**Defendant's Testimony in Chief**

C. E. Flye, a witness on behalf of defendant Steamship Company, being duly sworn, testified as follows:

"I live in Tacoma; I am agent for the Alaska Pacific Steamship Company, and was so employed at the time Mr. Egan was hurt. I remember the occasion. The Admiral Sampson was one of the company's vessels. The Sperry Flour Company had engaged space for a certain amount of tonnage and we called at their dock to take it. I do not remember the exact amount, but think it was 100 tons. The vessel was sent down there in obedience to that order. Our ships call at that dock nearly every trip, averaging about twice a week. All the Pacific Coast boats or ships, or nearly all of them, call at the same dock. They have the same service as we have, twice a week, and different lines that the Dodwell Company represent and two Japanese lines, and the Oriental boats are there very often. I have seen the Sperry Flour Company's wharf a number of times, and know the location of the two inshore dolphins and also the two that are out near the end of the wharf. No part of these dolphins or planks or approaches to them belong to the Alaska Pacific Steamship Company. We never furnished any of them, either dolphins or planks. The only way of reaching these dolphins is by plank. I have seen them, that is the plank, attached to the dolphins reaching out from the shore. So far as I recall they were always there. Our company never furnished



(Testimony of C. E. Flye.)

any of them and did not own any of them. I was not at the wharf at the time of the accident."

No cross-examination.

### **Testimony of Wm. F. Brady**

Wm. F. Brady, a witness for defendant Steamship Company, being duly sworn, testified as follows:

"I was boss longshoreman at the Sperry Flour Company's wharf at the time of the accident to Egan; had been on the premises a great many times before. The Alaska Pacific Steamship Company did not furnish any of the planks that were attached to the Sperry Flour Company's dolphins, that is any shore dolphins. As far as I know the plank to those inshore dolphins were always there. I always found them there. I do not know to whom they belong. I do not know of any property around that dock belonging to anybody except the Sperry Flour Company. I do not know who owns the property there. I think the dock and the wharf and the dolphins there are part of the plant of the Sperry Flour Company. I worked there and about there for other companies besides the Alaska Pacific Steamship Company in the same capacity. So far as I know none of these steamship companies ever furnished any of those planks. At the time I directed Egan to case on the line I was aboard the steamer. Up to that time I had no occasion myself to go out on this particular plank or to this particular dolphin,

(Testimony of William F. Brady.)

or to any of the others on that day. This particular plank had been used by someone in my employ when the vessel came in and was moored to the wharf and the line made fast to the dolphin."

"Q. Had any report been made to you that it was in a defective condition or anything the matter with it?"

"A. No, sir."

"Q. Did you have any knowledge whatever as to it being out of order or defective in any way?"

"A. No, sir."

No cross-examination.

### **Testimony of Thomas Grant**

Thomas Grant, a witness for defendant Steamship Company, being sworn, testified as follows:

"I reside at Seattle; have been on Puget Sound since 1874; am a licensed captain, and have been in connection with the shipping business all that time. Am acquainted with the Harbor of Tacoma and other harbors on the Sound. I have operated vessels and brought them in alongside the Sperry Flour Company's dock, and know its location and its various conveyances. The particular purpose the dolphins are used for is to hold the vessel to the dock, by running a line out to them. You cannot hold the boat to the dock without the dolphins. At the Northern Pacific, and other similar wharves, what we call piles are driven down inside the cap of the wharves. The wharf is built out around them, but they serve the same purpose as these dol-



(Testimony of Thomas Grant.)

phins. The only difference is the temporary structure at the Sperry Flour Company and they do not allow the vessel to tie to the wharf proper at all. They have to tie to these dolphins. At the Sperry Mill the only way to go out to the dolphins is over a plank extending from the shore. I have been on these ships for nearly three years, on the Alaska Pacific Steamship Company's ships; once or twice a week right along we called at the Sperry Flour Company's plant. I always saw the plank leading out to the dolphins, pretty near always. Sometimes they are away, but I never noticed for sure. When a ship is chartered to take a cargo at a wharf, such as the Sperry Flour Company's wharf, the ship does not come provided with planks to get out to the dolphin such as this dolphin. The general supposition is that the charter furnishes a safe place to moore the vessels, and in order to furnish a safe place these planks are necessary as a part of the approach to the wharf and the dolphins. There is no way of getting to the dolphin unless you go by the plank or by boat."

The Court interrupted: "The plaintiff alleges the same facts you are attempting to prove, that this plank was furnished by the Sperry Flour Company. As far as plaintiff is concerned, he is bound by that allegation. Of course the Sperry Flour Company was not bound and made them prove it because they denied it."

Testimony continued:



(Testimony of Thomas Grant.)

“Q. When a vessel comes to the wharf for the purpose of tying up and mooring alongside of it, and making use of the necessary appliances for either loading or unloading cargo, such a wharf as the Sperry Flour Mill Company’s wharf, do you as a matter of custom make any inspection of the conditions of the wharf and the plank and dolphins and other appliances?”

“A. No, sir.”

CROSS-EXAMINATION BY MR. JACOBS.

“I was not in command of the Admiral Sampson on the night of the accident. I was pilot on the bridge. The captain was in command. I did not bring the vessel in there. The captain had charge of that. When she leaves the dock I have charge of it. When she is being put to the dock the Captain has charge of it. Mr. Brady has charge of the men who are unloading the vessel and loading her.”

Witness excused.

It was agreed between counsel that the distance from the bow dolphin to the stern line dolphin was between three and four hundred feet. At this point the defendant Alaska Pacific Steamship Company, by its counsel, rested, and the plaintiff by his counsel, Fitch & Jacobs, rested.

This concluded the testimony and the foregoing constitutes all of the testimony taken in the case. Thereafter both parties having rested the case was argued before the jury by counsel for the respective parties. After the argument of counsel the defend-

ant Steamship Company requested the court in writing to charge the jury as follows:

1. "You are instructed that the mere fact that other kinds of plank, or methods of fastening or using such planks, than those used in this instance were used by others and can be or could have been used in this instance, is no evidence of negligence in this case. If the plank and the manner in which it was used as an approach to the dolphin in this case was according to the general, usual and ordinary course adopted by those in the same or similar business, and was in general use, then neither of the defendants are guilty of negligence in using it or in the manner of fastening said plank, even though you believe the other methods of approach to said dolphin which might have been used would have been safer. A master is not obliged to adopt and use the newest and safest appliances if what he does in fact use is such as is in general use, that is, all the law requires."

2. "If you find that the plank was used as an approach to the dolphin and was practically necessary for that purpose and that the Sperry Flour Company furnished or was under the obligation of furnishing same as such necessary part of its wharf and approaches, and that the Alaska Pacific Steamship Company only made temporary use of the same just as other customers of the Sperry Flour Company did, then the said Steamship Company was under no obligation to see that the plank was reasonably safe in the first instance, or that it was kept



in a reasonably safe condition. It would be liable only for damages due to defects therein which were actually brought to its notice. It would not be liable for dangers arising during, or as the result of the progress of the work."

3. "The plaintiff and William Wright were fellow servants in this instance and if you find that said Wright was negligent in any respect and plaintiff's injuries were the direct and proximate result thereof, plaintiff could not recover against defendant Steamship Company, because the dangers arising from the negligence of fellow servants are assumed by the employee and he cannot recover for damages suffered thereby."

Thereupon the court orally instructed the jury as follows:

**"GENTLEMEN OF THE JURY:**

"This is an action to recover damages for a personal injury. The plaintiff alleges that on or about the 10th day of December, 1910, the plaintiff was in the employ of the defendant, Alaska Pacific Steamship Company, and was engaged in assisting in the loading of a certain vessel belonging to the said company, with flour, at the plant of the defendant, Sperry Flour Company, on the water-front of Tacoma Harbor in Pierce County, Washington; at which time the said steamship was lying at the wharf of the defendant, Sperry Warehouse Company, and held fast at the stern by a line reaching from the stern of the ship to a dolphin driven for said purpose about ten or twelve feet from the



shore and immediately in front of said defendant, Sperry Flour Company, which dolphin was connected with the shore by a board or plank about two inches thick and twelve inches wide, and extending from one of the piles of the dolphin to the shore, which dolphin was composed of a group of five piles, the center one of which projected about four feet above the surrounding piles and the said dolphin and the plank connecting the same with the shore was a part of the plant of the defendant, Sperry Flour Company, furnished by said defendant for the use of ships while loading and discharging at its plant.

“That at about six o’clock in the evening of said date, the plaintiff, Joseph Egan, was ordered by the foreman under whom he was working, to cast off the stern line of the ship from the dolphin hereinbefore referred to, and that plaintiff immediately proceeded to obey said order by crossing from the shore to the dolphin on the plank provided for said purpose, and that while plaintiff was in the act of passing from the shore to the dolphin on said plank, said plank owing to being insecurely fastened slipped from the pile upon which it was resting and precipitated plaintiff together with said plank to the rock fill below, a distance of about twelve or fourteen feet.

“That at said time it was dark and plaintiff did not observe that said plank was insecurely fastened, and did not know that the same was unsafe, but the fact that it was insecurely fastened and was un-

safe and dangerous was well known and should have been well known to the defendants, and that said defendant Sperry Flour Company had carelessly and negligently constructed the same in an unsafe and dangerous position, and had carelessly and negligently allowed the same to become out of repair. And that the defendant, Alaska Pacific Steamship Company, had carelessly and negligently used said dolphin and the plank connecting the same with the shore, when the same was in a dangerous and unsafe condition, and dangerous for the use for which it was put, which danger was unknown to the plaintiff, but well known, or in exercise of reasonable care and inspection should have been well known to the defendants and each of them.

“The answer denies the allegations of negligence contained in the complaint, and alleges affirmatively that the accident to the plaintiff and the injuries and damages which he suffered or will suffer by reason thereof, as set forth in the *plaintiff* or otherwise, were the result of and were wholly due to the ordinary risks and dangers of the occupation in which the plaintiff was engaged at the time he was injured, which risks and dangers were open, apparent and known to the plaintiff and were assumed by the plaintiff at the time he entered this defendant's employ and at the time of the said accident, and were not due to the fault and negligence of this defendant.

“Also that the dolphin and the plank connecting the same with the shore, and by which the same is



reached as set forth in the complaint, were a part of the wharf and plant of the defendant Sperry Flour Company for the use of ships while loading and discharging at its plant, and constituted a part of the wharf of said defendant Sperry Flour Company; that this defendant made use of the wharf and its approaches and conveniences, including said dolphins, for the purpose of loading one of its vessels, to-wit the steamship 'Admiral Sampson,' at the said wharf and plant of the said defendant Sperry Flour Company on the date alleged in the complaint; that this defendant was requested and ordered by the said Sperry Flour Company to load its said vessel at the said wharf and plant of the said defendant Sperry Flour Company and was engaged in loading its said vessel on said date at the said wharf and plant of said defendant Sperry Flour Company, in pursuance to the said request and contract therefor with and from said defendant, the said Sperry Flour Company; that the said wharf and plant, appurtenances and conveniences, were maintained by the said defendant Sperry Flour Company as a wharf for the benefit of ships while loading and discharging at its plant, and this defendant had reason to believe and did believe at all times that the said wharf and plant, and appurtenances and conveniences, were being maintained in a good and safe condition, and there was nothing to indicate to this defendant that the said wharf and plant, or the said dolphin and its approaches, were not in a good and safe condition; that the plaintiff had the same opportunity for know-



ing and ascertaining the condition thereof as did this defendant, and if the said dolphin and the plank connecting the same with the shore were out of repair for any reason whatever the fact was unknown to this defendant, and this defendant was not responsible for the same, but the defendant Sperry Flour Company was and is the person solely and wholly responsible therefor and for the damages which have been or will be suffered by the plaintiff by reason thereof.

“The affirmative matter in the answer has been denied by a reply.

“Under these issues, gentlemen of the Jury, I instruct you that it is the duty of the master to furnish a reasonably safe working place for his servants, or in other words to exercise reasonable care in that regard. This duty or obligation extends not only to the working place or appliance owned by the master, but it applies equally to the working places or appliances owned by third persons which the master takes and uses temporarily as his own.

“The first question for your consideration in this case will be this: Was this plank, constructed as it was or laid as it was, a reasonably safe appliance for the purposes for which it was used and intended to be used? If you find from the preponderance of the testimony that it was not, your next question will be,—Did the defendant here have knowledge of the defective condition of that working place the day complained of? If you find that the defendant had no actual knowledge, the next question for your con-

sideration will be,—Could it by the exercise of reasonable diligence on its part have ascertained the true condition or defective condition of this working place? If you find each of these several propositions established by a preponderance of the testimony, that is if you find that the appliance was not reasonably safe, and the defendant knew of its unsafe condition, or by the exercise of reasonable care on its part should have known of its defective condition, then the plaintiff is entitled to recover here, unless he assumed the risk or was guilty of contributory negligence.

“On the question of assumption of risk I charge you that every servant when he enters the employ of another assumes all the ordinary risk incident to his employment. He does not, however, assume risks arising from his master’s negligence, unless he has notice of that negligence, or by the exercise of reasonable diligence on his part should have notice of that negligence.

“I further charge you that it was the duty of the plaintiff to exercise reasonable care for his own safety, and if you find that he failed to exercise reasonable care in that regard, and that his failure to do so contributed to his injury there can be no recovery in this case.

“If you find for the plaintiff under the instructions I have given you, it will be necessary for you to fix his compensation. This, as I have often told you, cannot be measured in dollars and cents. The amount is left to your sound sense and sober judgment. If



you find he is entitled to recover you will compensate him for any pain and suffering he has endured in the past as a result of this accident. You will compensate him for such pain and suffering as you find he will endure in the future by reason of this accident; you will compensate him for any impairment of his earning capacity in the future so far as it results from this accident. A person's earning capacity is not totally lost or destroyed simply because he cannot follow the business which he formerly followed. It is nevertheless the duty of the plaintiff to earn money where he can and when he can. The difference between his earning capacity now and his earning capacity prior to the accident will be the measure of his recovery in that regard.

“As I stated to you, the burden of proof is upon the plaintiff to show negligence on the part of the defendant by a preponderance of the testimony, that is by the greater weight of the testimony. On the other hand the burden of proof is upon the defendant to show by the preponderance of the testimony that the plaintiff assumed the risk, or was guilty of contributory negligence.”

MR. GRIGGS: “If the Court please, there is one request that occurs to me that I wish your Honor would give, and that is to exercise ordinary prudence in reference to the possibility of the planks getting out of order in the course of its use during the time the ship was there, and if the plaintiff knew or by reason of his experience and intelligence should have known that it might become loosened by the sway of



the ship or other causes occurring during that afternoon, it was his duty to consider that matter, and if the jury finds in case he had given proper consideration to that matter he would have anticipated this danger, in that case he would be held guilty of contributory negligence."

THE COURT: "I think that was covered by my general charge. Gentlemen of the Jury, the plaintiff must exercise reasonable care in view of all the circumstances. You should consider the dangerous employment in which he is engaged, the probability of the plank getting out of place, and everything concerning the case in determining whether or not he exercised that degree of care which an ordinarily prudent persons would have exercised under the same circumstances and conditions.

"I charged you also, gentlemen, that the safe place doctrine applied to appliances or property belonging to a third person to the same extent that it applied to property or appliances owned by the master himself. The master might not be required, however, to exercise the same degree of care as to appliances owned by third persons as to appliances which he owned himself. That is for you to say. It was his duty to exercise that same degree of care in regard to this appliance which he used and which belonged to third persons, which an ordinarily prudent man would have exercised under the same circumstances and conditions."

## **Defendant's Exceptions to Certain Parts of the Instructions of the Court to the Jury**

Thereupon defendant Alaska Pacific Steamship Company in open court and before the jury had retired or rendered a verdict, excepted to all that part of the court's charge, which is as follows:

"Under these issues, gentlemen of the jury, I instruct you that it is the duty of the master to furnish a reasonably safe working place for his servants, or in other words to exercise reasonable care in that regard. This duty or obligation extends not only to the working place or appliances owned by the master, by it applies equally to the working place or appliances owned by third persons which the master takes and uses temporarily as his own."

Said defendant also excepted to the failure and refusal of the court to give instruction No. 1 which had been requested by the defendant as aforesaid, the terms of which have heretofore been recited.

The defendant further excepted to the refusal of the court to give instruction No. 2 requested by defendant, the terms of which have been heretofore recited.

Defendant further excepted to the failure of the court to give instruction No. 3, requested by said defendant, the terms of which have been heretofore recited.

Each and all of defendant's said exceptions was and were duly allowed by the court.

Thereupon the jury having received the charge of the court as aforesaid, retired to consider their ver-



dict, and returned into court with a verdict in favor of plaintiff for damages in the sum of \$4,000, which verdict was received and rendered on the 28th day of September, 1911.

### **Presentation of Bill of Exceptions, Etc.**

Now in the furtherance of justice and that right may be done, the defendant Alaska Pacific Steamship Company presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the Judge, as provided by law; and that the court does hereby sign, seal and allow the same.

Jany. 11th, 1912.

HERBERT S. GRIGGS,

Attorneys for defendant, Alaska Pacific Steamship Company.

FITCH & JACOBS,

Attorneys for Plaintiff.

### **Order Settling Bill of Exceptions**

This cause having been brought on regularly before the Court on this 15th day of January, 1912, on the application of the defendant Alaska Pacific Steamship Company for the settling and certifying of its proposed Bill of Exceptions heretofore filed herein, and the time for settling and certifying said Bill of Exceptions have been duly extended by order of the Court and by stipulation of the parties, to and including this day, and the parties having agreed together with respect to the aforesaid bill of Exceptions as the same is now presented to me, the plaintiff having consented to the bill of exceptions as



originally prepared by the defendant, and the same being filed with the consent of the parties, and the court, NOW, THEREFORE, on motion of H. S. Griggs, attorney for defendant Alaska Pacific Steamship Company,

IT IS ORDERED that the said proposed Bill of Exceptions heretofore filed in this cause as the same is now signed, be and the same is hereby settled as the true bill of exceptions in this cause, and that the same as so settled be now and here certified accordingly by the undersigned judge of said court who presided at the trial of said cause, and that said bill of exceptions when so certified be filed with the clerk.

FRANK H. RUDKIN, Judge.

**Requested Instructions of Alaska Pacific  
Steamship Company**

I.

It is admitted that plaintiff, at the time of the accident was working as an employee for defendant Alaska Pacific Steamship Company,—that is the relation then existing between them of servant and master, or employee and employer; and under such circumstances the law fixes certain more or less definite burdens and obligations upon the employer, that is the Alaska Pacific Steamship Company with reference to its employee, the plaintiff in this case. Those obligations however, vary considerably under different circumstances. The negligence complained of in this case is the method of fastening the plank to the dolphin, the plaintiff claiming that the plank

in this instance was insecurely fastened, and that the plaintiff fell and suffered his injuries for that reason. What were the duties of the Alaska Pacific Steamship Company with reference to that plank and the manner in which it was fastened to the dolphin, depends to a large extent upon whether or not the plank was an appliance owned or furnished by the Alaska Pacific Steamship Company.

If the plank, was in fact, owned or furnished by the Alaska Pacific Steamship Company for access to the dolphin, it was the duty of the Alaska Pacific Steamship Company to furnish a reasonably safe plank for that purpose. But the steamship company would not be, and was not required to furnish any particular kind of plank, or to fasten it or to place it upon the dolphin in any particular manner, nor to fasten it at all if you believe under all the circumstances it could have been used for said purpose with reasonable safety, although not permanently fastened to the dolphin. The Steamship Company in that case, was not bound either to select the best plank that could have been selected, nor was it bound to fasten it or place it for use in the safest and best manner. If at the time of the selection and use of the plank and the method of placing same so as to go out to the dolphin, the plank actually selected and the manner in which it was actually placed ready for use, were the same as, or were similar to what were generally used for the same purpose and operated in the same way on that and other similar wharfs, and if they were at the same time reason-



ably adapted to the purposes for which they were intended, and reasonably safe, then the defendant Alaska Pacific Steamship Company had fully discharged its duty toward the plaintiff. The defendant Steamship Company in that case would be liable for the consequences, not of danger (for nearly all work and employment of this character is more or less dangerous) but of negligence, and the unbending test of negligence and methods and appliances is the ordinary usage of the business. And in regard to the style of the appliances and methods of using the same, or mode of performance of any work, the words "reasonably safe" mean safe, according to the usage, habits and ordinary risks of the business, absolute safety is unattainable, and employers are not insurers.

## II.

The Court instructs you that the defendant, Sperry Flour Company, as the owner of the wharf and appurtenances and as the charterer of the defendant Alaska Pacific Steamship Company's vessel, was under the duty and obligation to furnish a reasonably safe wharf with the appurtenances and appliances usually and commonly furnished therewith necessary to its ordinary, proper and convenient use. It is admitted that the dolphin in question was owned and furnished by the Sperry Flour Company, and if you find from the evidence that the plank which plaintiff complains of was an appliance that was in fact reasonably necessary for the ordinary, proper and convenient use of the dolphin, then the burden was on the defendant Sperry Flour Co. to



furnish such a plank or means of access, and to furnish one reasonably safe for said purpose, and if you find that it failed to meet said obligation and that the plank was in fact insecurely fastened and that defendant, Sperry Flour Company, knew or should have known thereof, had they used ordinary care and made reasonable inspection, and that plaintiff was injured because of said defect and without the fault or negligence on his own part contributing thereto, your verdict should be against the defendant Sperry Flour Company, and in that case should be in favor of defendant Alaska Pacific Steamship Company, unless you further find from the evidence that the defect was so obvious and apparent that they knew or should have known thereof and have and should have taken precautions against the dangers therefrom.

### III.

“The defendant, Alaska Pacific Steamship Company, with its agents and employees, including the plaintiff, were upon the premises belonging to defendant<sup>e</sup> Sperry Flour Company at the request and by invitation from the Sperry Flour Company, and had the right to be there and had the right to assume that said Sperry Flour Company would furnish a reasonably safe wharf and appurtenances for the purposes for which said Alaska Pacific Steamship Company and its employees, were there, to-wit: a reasonably safe wharf and appurtenances for the mooring and berth of the said Steamship Company's vessel alongside of said wharf and taking on of a cargo and leaving said wharf.

And if you find that the said plank complained of, was a reasonably necessary appliance which it was under obligation to furnish, and that it neglected to use ordinary care in seeing that same was in a reasonably safe condition for the use for which it was intended, and plaintiff's damages were suffered as the direct and proximate result thereof, and he himself was not in fault contributing to his own injuries, then your verdict should be against said Sperry Flour Company and in favor of plaintiff and of said Alaska Pacific Steamship Company."

### **Petition for Writ of Error**

The defendant, Alaska Pacific Steamship Company, feeling itself aggrieved by the verdict of the jury and judgment entered in this cause on the 28th day of September, 1911, comes now by H. S. Griggs, its attorney, and petitions the Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error conditioned as required by law as in cases where no supersedeas or stay of execution is requested.

Respectfully submitted,

H. S. GRIGGS,

Attorney for Defendant Alaska Pacific Steamship Company.



**Order Allowing Writ of Error**

On motion of H. S. Griggs, attorney for defendant Alaska Pacific Steamship Company, and on filing a petition for writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error is hereby fixed at \$1000.00.

WITNESS the signature of the Honorable Frank H. Rudkin, Judge of the above named court hereto annexed at the July, 1911, term of said court, and on, to-wit, the 15 day of January, 1912, in the city of Tacoma, State of Washington, within said Western District.

FRANK H. RUDKIN,  
Judge.

**Bond on Writ of Error**

WHEREAS in the above numbered and entitled cause defendant Alaska Pacific Steamship Company has applied to the Honorable Frank H. Rudkin, Judge of the above named court for the allowance of a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

WHEREAS said court has fixed the security which the defendant shall give and furnish in the sum of One Thousand Dollars (\$1,000.00),

NOW, THEREFORE, the Alaska Pacific Steamship Company, a principal, and the other subscribers hereto, as sureties, acknowledge ourselves held and



firmly bound unto the plaintiff, Joseph Egan, in the sum of \$1000.00.

CONDITIONED that the Alaska Pacific Steamship Company, appellant, shall prosecute its writ of error to effect, and if it fail to make its plea good, shall answer all costs.

The surety hereto hereby further expressly covenants and agrees that in case of a breach of any condition of this bond, the above entitled Court may upon notice to the surety of not less than ten days, proceed summarily in the action in which the said bond is given to ascertain the amount which the said surety is bound to pay on account of the breach thereof and render judgment therefor against the surety and award execution therefor against the surety.

IN TESTIMONY WHEREOF WITNESS the names of the parties hereto affixed by their duly authorized officers this the 16th day of January, 1912.

ALASKA PACIFIC STEAMSHIP CO.

By H. F. ALEXANDER, President.

(Seal of Surety Co.)

NATIONAL SURETY COMPANY,

By GEO. W. ALLEN.

### **Assignment of Errors**

Comes now defendant Alaska Pacific Steamship Company and files the following assignment of errors upon which it will rely upon its prosecution of its writ of errors in the above numbered and entitled cause.

## I.

The Honorable Circuit Court erred in refusing to grant defendant's motion for a judgment of nonsuit and dismissal made at the conclusion of plaintiff's testimony, and which is as follows:

1. That no questionable negligence had been proven against the Alaska Pacific Steamship Company.

2. That the testimony conclusively showed that plaintiff assumed the risk of injury when he attempted to walk the plank.

3. That the evidence conclusively showed that plaintiff was guilty of contributory negligence.

4. That the evidence failed to show why or because of what particular defect the plank fell, and the evidence does show affirmatively that the Alaska Pacific Steamship Company had no knowledge that the plank or its fastenings or the approach to the dolphin was in a defective condition in any particular, but was informed by actual use of the plank in the ordinary way two hours before this accident that it was in a reasonably safe condition.

5. That the Alaska Pacific Steamship Company had no knowledge, either actual or constructive, of any defective condition in the plank or the approach to the dolphin which would make the defendant responsible for the accident that did happen or the damages that plaintiff suffered thereby.

All of which will more fully appear from defendant's Bill of Exceptions.



## II.

The verdict of the jury is contrary to the law and the undisputed evidence in that it appears from the undisputed proof, and from plaintiff's own testimony that it was his own duty to inspect the plank and the approach to the dolphin, and the condition thereof, and that the condition thereof and the dangers incident to such condition were as well known to plaintiff as to this defendant, or better known to plaintiff than to this defendant, and that he assumed the risk of injury therefrom, and that the lower court therefor erred in rendering judgment against defendant.

## III.

The verdict of the jury is contrary to the law and the undisputed evidence in that there was no evidence offered or introduced that the defendant Alaska Pacific Steamship Company had any notice, either actual or constructive, of any defective condition in the plank or in the approach to the dolphin, or about any other defective condition that was in any way responsible for plaintiff's injuries, and that the evidence is insufficient to sustain the verdict of the jury and the judgment of the court.

## IV.

That the court erred in charging the jury that the Alaska Pacific Steamship Company was under obligation to furnish a reasonably safe working place for its servants and to exercise reasonable care in that regard, not only with respect to the working place or appliances owned by the said defendant, but that



that duty applied equally to the working place of appliances owned by third persons which defendant took and used temporarily as its own.

#### V.

The said court erred in refusing to give the jury the following instruction numbered 1, requested by this defendant, to-wit:

“You are instructed that the mere fact that other kinds of plank, or methods of fastening or using such planks, than those used in this instance were used by others and can be or could have been used in this instance, is no evidence of negligence in this case. If the plank and the manner in which it was used as an approach to the dolphin in this case was according to the general, usual and ordinary course adopted by those in the same or similar business, and was in general use, then neither of the defendants are guilty of negligence in using or in the manner of fastening said plank, even though you believe the other methods of approach to said dolphin which might have been used would have been safer. A master is not obliged to adopt and use the newest and safest appliance if what he does in fact use is such as is in general use, that is, all the law requires.”

All of which more fully appears from defendant's Bill of Exceptions.

#### VI.

That said court erred in refusing to give the jury instruction Numbered 2, requested by this defendant, which is as follows:

“If you find that the plank was used as an approach to the dolphin and was practically necessary for that purpose and that the Sperry Flour Company furnished or was under the obligation of furnishing same as such necessary part of its wharf and approaches, and that the Alaska Pacific Steamship Company only made temporary use of the same just as other customers of the Sperry Flour Company did, then the said Steamship Company was under no obligation to see that the plank was reasonably safe in the first instance, or that it was kept in a reasonably safe condition. It would be liable only for damages due to defects therein which were actually brought to its notice. It would not be liable for dangers arising during, or as the result of the progress of the work.” All of which more fully appears from defendant’s Bill of Exceptions.

#### VII.

The court erred in refusing to give instruction numbered 3, requested by the defendant, which is as follows:

“The plaintiff and William Wright were fellow servants in this instance and if you find that said Wright was negligent in any respect and plaintiff’s injuries were the direct and proximate result thereof, plaintiff could not recover against defendant Steamship Company, because the dangers arising from the negligence of fellow servants are assumed by the employee and he cannot recover for damages suffered thereby.”

All of which more fully appears from defendant’s Bill of Exceptions.



## VIII.

The said court erred in overruling defendant's motion for new trial.

## IX.

The said court erred in over-ruling defendant's motion for judgment notwithstanding the verdict.

WHEREFORE defendant, plaintiff in error, prays that judgment of the Honorable Circuit Court of the United States for the Western District of Washington, be reversed, and that such directions be given that full force and efficacy may enure to defendant by reason of its defense to this cause.

H. S. GRIGGS,

Attorney for Defendant Alaska Pacific Steamship Company.

No. 1736.

**Supplemental Assignment of Error**

The Alaska-Pacific Steamship Company hereby makes the following assignment of error in lieu of the assignment No. IV heretofore specified, and this supplemental assignment being made in order to state the same fully and in compliance with the rules of the above entitled court, to-wit: the said court erred in giving the following instruction, to-wit: "Under these issues, gentlemen of the jury, I instruct you that it is the duty of the master to furnish a reasonably safe working place for his servants, or in other words, to exercise reasonable care in that regard. This duty or obligation extends not only to the working place or appliances owned by the master, but it applies equally to the working place



or appliances owned by third persons, which the master takes and uses temporarily as his own.”

H. S. GRIGGS,

Attorney for Alaska-Pacific Steamship Company.

### **Writ of Error**

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, .

### *G R E E T I N G :—*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between JOSEPH F. EGAN, plaintiff and defendant in error, and ALASKA PACIFIC STEAMSHIP COMPANY, defendant and plaintiff in error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid on this behalf, do command you, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, within thirty days from the date of this Writ, in the said Circuit Court

of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

WITNESS THE HONORABLE C. H. HANFORD, United States District Judge for the Western District of Washington, at Tacoma, Washington, this 22nd day of May, A. D. 1912.

(Seal)

A. W. ENGLE,

Clerk of the United States District Court for the Western District of Washington.

By JAMES C. DRAKE,

Deputy Clerk.

### **Citation**

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA, TO JOSEPH F. EGAN, Defendant,  
*G R E E T I N G*:—

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, to-wit on the 21st day of June, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Alaska Pacific Steamship Company is plaintiff in error, and Joseph F. Egan is defendant in error, to show cause, if any there be, why the judgment in



the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE C. H. HANFORD, United States District Judge, for the Western District of Washington, at Tacoma, this 22nd. day of May, A. D. 1912.

(Seal)

C. H. HANFORD,  
United States District Judge, presiding in the Western District of Washington.

“Service of above citation by receipt of copy accepted May 27, 1912.

FITCH & JACOBS,  
Attorneys for Defendant in Error.”

**Certificate**

UNITED STATES OF AMERICA, }  
WESTERN } ss.  
DISTRICT OF WASHINGTON. }

I, A. W. ENGLE, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of JOSEPH F. EGAN, plaintiff and defendant in error, versus ALASKA PACIFIC STEAMSHIP COMPANY, a corporation, defendant and plaintiff in error, as the same remain on file and of record in my office.

I further certify that I hereto attach and herewith transmit the Original Citation and Writ of Error issued in said case, together with original Exhibits



—(Plaintiff's Exhibits "A." "B," "C," "D" and "E"—being photographs).

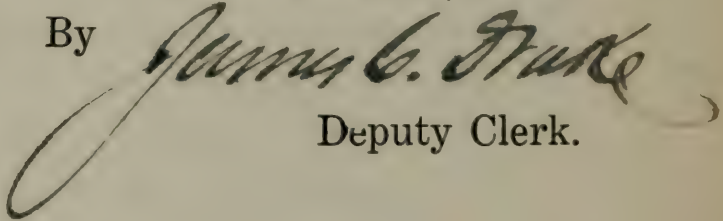
I further certify the cost of preparing and certifying the foregoing record to be the sum of \$98.70, which sum has been paid to me by the attorney for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Tacoma, in said District, this 8th day of June, 1912.

A. W. ENGLE, Clerk.

(SEAL)

By

  
Deputy Clerk.

No. 2149

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC STEAMSHIP  
COMPANY, a corporation,  
*Plaintiff in Error,*

VS.

JOSEPH EGAN,  
*Defendant in Error.*

---

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

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## BRIEF OF PLAINTIFF IN ERROR

---

HERBERT S. GRIGGS,  
*Counsel for Plaintiff in Error.*

1115 Fidelity Bldg., Tacoma, Wn.

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No. ....

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC STEAMSHIP  
COMPANY, a corporation,  
*Plaintiff in Error,*

VS.

JOSEPH EGAN,  
*Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

---

## BRIEF OF PLAINTIFF IN ERROR

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### STATEMENT OF THE CASE.

The defendant in error, Joseph Egan, sued plaintiff in error, Alaska Pacific Steamship Company, to recover damages for injuries suffered while

he was working as a longshoreman assisting to load and discharge one of the Steamship Company's vessels, the Admiral Sampson, which had been chartered by the Sperry Flour Company to take on about one hundred tons of flour at the Flour Company's private wharf and dock adjoining its flour mill in the harbor of Tacoma.

The accident occurred on the 10th day of December, 1910. The Flour Company was a party defendant jointly with the plaintiff in error to the original suit, plaintiff in error being sued as the employer of the defendant in error, and the Flour Company being sued as the owner of the wharf and of the dolphin and plank from which the defendant in error fell, which dolphin and plank were alleged to be in a dangerous and unsafe condition. It was further alleged that the accident happened because of such dangerous and defective condition. The original complaint alleged specifically the method of construction and use of the dolphin and plank. (See paragraph 2 on pages 5 and 6 of Transcript.)

These allegations were admitted in the answer of plaintiff in error (see paragraph 2 on page 9 of Transcript), and, for the purposes of this appeal, it is therefore admitted, "that the dolphin in question was composed of a group of five piles, the "center one of which projected about four feet above "the surrounding piles, and that this dolphin was "connected with the shore by a board or plank "about ten or twelve feet long, two inches thick and

“twelve inches wide. That this dolphin and plank  
“were a part of the plant of the Sperry Flour Com-  
“pany and furnished by that Company for the use  
“of ships while loading and discharging at its  
“plant.” Also that at the time of the accident, the  
ship of the plaintiff in error was lying at the Sperry  
Flour Company’s wharf, held fast by two lines  
to two such dolphins, the bow line being fast to the  
dolphin in question. (Page 6 of Transcript.)

These facts are not only admitted facts under  
the original pleadings between plaintiff in error and  
defendant in error, but were fully proved in the  
evidence as shown by the Transcript. The Sperry  
Flour Company, however, had expressly denied  
either owning or furnishing the plank connecting  
the dolphin to the shore, and, after defendant in  
error had rested, the lower Court, upon motion of  
the Sperry Flour Company, directed a dismissal of  
the suit as against the Sperry Flour Company, for  
the reason that the defendant in error had failed  
as against such express denial to prove such owner-  
ship or to prove that the Sperry Flour Company  
had furnished the plank and dolphin as a part of its  
plant. (See Transcript, pages 42 and 44 and also  
remarks of Court at the bottom of page 48.)

Plaintiff in error expressly objected to the dis-  
missal of the suit as against its co-defendants Sperry  
Flour Company. (See paragraph 6 on page 43 of  
Transcript.) But the action of the Court in mak-  
ing such dismissal and the exceptions to the Court’s



rulings taken by the plaintiff in error are not urged here as grounds for appeal.

Plaintiff in error also moved for dismissal of the suit against it on the several grounds set forth in its motion (see pages 42 and 43 of the Transcript), and duly excepted to the Court's refusal to so order. (See page 44 of Transcript.)

The case was then allowed to proceed against the plaintiff in error, and after the evidence was all in and the case submitted upon argument and instructions, a verdict was rendered by the jury in favor of the defendant in error and against the plaintiff in error for the sum of \$4,000. On September 28th, 1911, judgment was rendered upon said verdict. (See pages 15 and 16 of Transcript.) Plaintiff in error duly moved for a new trial, and also moved for judgment notwithstanding the verdict (see pages 17 and 18 of Transcript), and on December 11th, 1911, said motions of plaintiff in error were both denied. (See page 18 of Transcript.) On January 11th, 1912, a bill of exceptions was duly prepared and signed by the attorneys for both plaintiff in error and defendant in error and presented (see pages 19 to 60, inclusive, of Transcript), and on January 15th, 1912, the lower Court made an order settling the bill of exceptions. (Pages 60 and 61 of Transcript.) On September 28th, 1911, plaintiff in error duly petitioned for writ of error to this Court (page 65 of Transcript), and on January 15th, 1912, during

the same term of Court the said writ of error was allowed. (Page 66 of Transcript.) Thereafter on January 16th, 1912, a bond on writ of error was duly prepared and filed on behalf of the plaintiff in error, and thereafter a formal assignment of errors was duly prepared and filed on behalf of plaintiff in error. (Pages 67 to 72, inclusive, of Transcript.) Writ of Error was then prepared and citations issued. (See pages 73 to 75, inclusive, of Transcript.)

No question is made on this appeal as to the character or extent of the injuries of defendant in error, or the amount of the verdict, and for that reason all the testimony of the doctors or others on that subject was omitted from the record on appeal. The further facts as shown by the evidence are as follows:

Plaintiff in error owned and operated in the Tacoma harbor the Admiral Sampson and other steamers, all of which called at more or less frequent intervals at the Sperry Flour Company's wharf and manufacturing plant to take on cargoes of flour for Southern ports. Many other steamship lines called at the same wharf and used it in the same way, viz.: the Blue Funnel line, Pacific Coast line, Dodwell line, and two Japanese lines, etc. (See testimony of Brady, page 27 of Transcript, and testimony of Flye, page 45 of Transcript.)



The Sperry Flour Company's plant consisted of a flour mill and a sea wall with a short wharf extending out to deep water. About ten or twelve feet from this wharf on each side of it were two inshore dolphins near the sea wall and two offshore dolphins near deep water. The ship's lines were made fast to these dolphins. The only method of reaching the inshore dolphins was by means of planks described in the pleadings as two inches thick, twelve inches wide and twelve or fourteen feet long. These dolphins and these planks were a part of the appliances furnished by the Sperry Flour Company to and for the use of such ships as were chartered to take on flour or other freight at the Sperry Flour Company's wharf. (See testimony of Brady, pages 19 and 20 and 26, and testimony of Flye and Brady, pages 45 and 46 of Transcript.)

Defendant in error was a longshoreman, and at the time of the accident was one of several others hired under Wm. F. Brady as boss-longshoreman to help receive, load and discharge the vessel belonging to the plaintiff in error, called the Admiral Sampson. The boat tied up at the dock about 3 o'clock on December 10th. (Testimony of Brady, page 23 of Transcript.) At that time the ship made fast to both of the inshore dolphins, and Mr. Egan, the defendant in error, together with Mr. Wright and Mr. Thurston, two other longshoremen, made these lines fast. (Testimony of Brady, page 25 of Transcript.) And these were the same lines, of course,



which Egan and Richter went to loosen at the time of the accident. The loading of the vessel was finished a little after 5 p. m. (Brady's testimony, page 21 of Transcript.) At that time the defendant in error was told by Brady, the boss longshoreman, that he, the defendant in error, "had better stay and help with the line," and accordingly the defendant in error and another longshoreman, Richter, started to cast off the lines, Richter going to one of the inshore dolphins and the defendant in error started out on the plank and took a couple of steps—possibly three—when the plank suddenly tilted and the plank and defendant in error went down together. Defendant in error fell upon the rocks below, the tide being out, and was severely injured. (See Egan's testimony, pages 35 and 39 of Transcript.)

Defendant in error was a longshoreman who had had about 22 years' experience in that business all along the Tacoma harbor, and had been around and on the Sperry Flour Company's plant and wharf doing the same sort of work many times, much of the time with this same Brady. (Brady's testimony, page 23, and Egan's testimony, pages 36 and 40 of Transcript.) During all that time the dolphins were in practically the same condition as to construction and approach and method of use as they were at the time of the accident. This is shown not only by the testimony of Brady, page 23 of Transcript, but also by the photograph, Exhibit

"H," which was admitted in evidence as a correct photograph of the particular dolphin and plank from which defendant in error fell. (See Transcript, page 20.)

Brady testifies: "Mr. Egan has helped me "many times for the last year and a half loading "ships at the Sperry Flour Company. It would "be hard to say how many times, but quite a few "times. During all of that time these dolphins "and the particular one shown on Exhibit 'E' has "been in the same position so far as I know. I "never noticed any change in it to indicate it was "in any other condition at the present time than "it was on December 10th or theretofore." (Transcript, page 23.)

Defendant in error himself admits working about the plant and does not deny that he had been over the same dolphin before, though not recently. (Egan's testimony, page 26 of Transcript.) He had been on the other inshore dolphin and helped to make the line fast that very day when the boat came in (*id.*), and the testimony of Egan and Brady and the photographs also show that all these dolphins were in the same condition, constructed and used in the same way.

At the time of the accident it was quite dark. Ernest Richter, the other longshoreman, who went at the same time to cast off the stern line, testified he could see large objects,—the ship, the dolphin,



etc., but that he “had to strike a match to see the plank,” and that he “took that precaution.” (Transcript, page 30.) We wish to suggest right here that a twelve-foot plank is distinctly an adjustable contrivance—and could easily have been tested and adjusted (if necessary to safety) by Egan, had he shown the same prudence as Richter. About three hours before that, at 3 o’clock when the boat arrived, it was day time, and defendant in error had used the same sort of a plank to reach the other inshore dolphin and make fast the stern line. At that time defendant in error testifies (Transcript, page 40, at bottom): “I could see everything I did. “I could see that plank on that end the same as I “could see on this end, and it looked secure enough “to me to go out there and help put the lines on.  
 \* \* \* (on next page, 41) “Somebody else “made fast the bow line. It was Mr. Thurston. “He is right here” (indicating in the court room). We submit it was part of plaintiff’s case in the trial court to produce Thurston and show what he knew about the plank.

Brady, the boss-longshoreman, testifies that the ship’s lines when she arrived were made fast to both of the inshore dolphins, and that “none of “the men made any report to me as to anything “about the plank begin unsafe or not in proper “condition. As boss longshoreman I had often “made fast and unfastened, myself, the lines to “these same dolphins. All the dolphins down there



"are pretty nearly the same as shown in this picture, Exhibit 'E,' except for varying distances." (Transcript, pages 25 and 26.)

On page 23, at bottom Brady testifies: "I do not know who laid the plank there on December 10th. It had been lying there ever since the ship moored up to the wharf about 3 o'clock."

On page 27, Brady further testifies: "All these dolphins have been used in just that way all of these years as far as I know. I supposed a man with the long experience of Mr. Egan knew just what he was doing."

Further on page 46 and 47, witness Brady testifies: "The Alaska Pacific Steamship Company did not furnish any of the planks that were attached to the Sperry Flour Company's dolphins, that is inshore dolphins. As far as I know the planks to those inshore dolphins were always there. I always found them there. \* \* \*

"At the time I directed Egan to cast off the line I was aboard the steamer. Up to that time I had no occasion myself to go out on this particular plank or to this particular dolphin or to any of the others on that day. This particular plank had been used by someone in my employ when the vessel came in and was moored to the wharf, and the line made fast to the dolphin."

"Q. Had any report been made to you that it

“was in a defective condition, or anything the matter with it?

“A. No, sir.

“Q. Did you have any knowledge whatever as to its being out of order or defective in any way?

“A. No, sir.”

There was no direct testimony whatever as to the exact condition of the particular plank which fell with Egan at the time of the accident. There was no testimony to show any defect or unsafe or dangerous condition, save the bare statement that the plank did fall while being used by the defendant in error to get out to the dolphin.

Plaintiff in error makes the following assignments of error committed by the lower Court, and which errors it desires this Court to review on appeal, to-wit:

### I.

The Honorable Circuit Court erred in refusing to grant defendant's motion for a judgment of nonsuit and dismissal made at the conclusion of plaintiff's testimony, and which is as follows:

1. That no questionable (actionable) negligence had been proven against the Alaska Pacific Steamship Company.

2. That the testimony conclusively showed that plaintiff assumed the risk of injury when he attempted to walk the plank.



3. That the evidence conclusively showed that plaintiff was guilty of contributory negligence.

4. That the evidence failed to show why or because of what particular defect the plank fell, and the evidence does show affirmatively that the Alaska Pacific Steamship Company had no knowledge that the plank or its fastenings or the approach to the dolphin was in a defective condition in any particular, but was informed by actual use of the plank in the ordinary way two hours before this accident that it was in a reasonably safe condition.

5. That the Alaska Pacific Steamship Company had no knowledge, either actual or constructive, of any defective condition in the plank or the approach to the dolphin which would make the defendant responsible for the accident that did happen or the damage that plaintiff suffered thereby.

## II.

That the Court erred in charging the jury as follows: "Under these issues, gentlemen of the jury, I instruct you that it is the duty of the master to furnish a reasonably safe working place for his servants, or in other words to exercise reasonable care in that regard. This duty or obligation extends not only to the working place or appliances owned by the master, but it applies equally well to the working place or appliances



“owned by third persons, which the master takes  
“and uses temporarily as his own.”

### III.

The said Court erred in refusing to give the jury the following instruction numbered 1, requested by this defendant, to-wit:

“You are instructed that the mere fact  
“that other kinds of plank, or methods of  
“fastening or using such planks, than those  
“used in this instance were used by others  
“and can be or could have been used in  
“this instance, is no evidence of negligence  
“in this case. If the plank and the manner  
“in which it was used as an approach to  
“the dolphin in this case was according to  
“the general, usual and ordinary course  
“adopted by those in the same or similar  
“business, and was in general use, then  
“neither of the defendants are guilty of  
“negligence in using or in the manner of  
“fastening said plank, even though you be-  
“lieve the other methods of approach to  
“said dolphin which might have been used  
“would have been safer. A master is not  
“obliged to adopt and use the newest and  
“safest appliance. If what he does in fact  
“use is such as is in general use, that is,  
“all the law requires.”

All of which more fully appears from defendant's Bill of Exceptions.

#### IV.

That said Court erred in refusing to give the jury instruction numbered 2, requested by this defendant, which is as follows:

“If you find that the plank was used as  
“an approach to the dolphin and was practi-  
“cally necessary for that purpose and that  
“the Sperry Flour Company furnished or  
“was under the obligation of furnishing  
“same as such necessary part of its wharf  
“and approaches, and that the Alaska Pacific  
“Steamship Company only made temporary  
“use of the same just as other customers of  
“the Sperry Flour Company did, then the  
“said Steamship Company was under no ob-  
“ligation to see that the plank was reason-  
“ably safe in the first instance, or that it  
“was kept in a reasonably safe condi-  
“tion. It would be liable only for damages  
“due to defects therein which were actually  
“brought to its notice. It would not be liable  
“for dangers arising during, or as the result  
“of the progress of the work.”

All of which more fully appears from defendant's Bill of Exceptions.

#### V.

The Court erred in refusing to give instruction

numbered 3, requested by the defendant, which is as follows:

“The plaintiff and William Wright were  
 “fellow servants in this instance and if you  
 “find that said Wright was negligent in  
 “any respect and plaintiff’s injuries were the  
 “direct and proximate result thereof, plain-  
 “tiff could not recover against defendant  
 “Steamship Company, because the dangers  
 “arising from the negligence of fellow ser-  
 “vants are assumed by the employee and he  
 “cannot recover for damages suffered there-  
 “by.”

All of which more fully appears from defendant’s Bill of Exceptions.

## VI.

The said Court erred in overruling defendant’s motion for new trial.

## VII.

The said Court erred in overruling defendant’s motion for judgment notwithstanding the verdict.

## ARGUMENTS AND AUTHORITIES.

Plaintiff in error presents the following points:

### I.

That defendant in error failed to prove any actionable negligence on the part of plaintiff in error, and as sub-divisions of this point—



(a) That where an employer makes use of an appliance such as the dolphin and plank in this case, owned and furnished by a third person to the employer for temporary use, the employer is under no responsibility to employees for damages suffered by them because of defects in such appliances and places, unless it is shown either that the employer had actual notice of such defects or that the defects were themselves so apparent, and they existed so long that the employer would be presumed to have had notice of the same or that there were special or peculiar circumstances putting the employer on inquiry or that would in the ordinary course of business call for special inspection.

(b) That a failure to make special inspection or tests, is not negligence, unless it *appears* that such tests were common or prudent, or that the employer had some reason to think an inspection was necessary.

(c) That appliances which can be adjusted by the employee himself, do not require of the employer any inspection with reference to dangers or defects that could be readily corrected and adjusted by the employee himself.

(d) That the employer is not responsible for defects arising in the course of the work, or by reason of changed conditions due to the progress of the work, it being admitted that suitable materials and appliances were furnished by the employer in the first instance.

(e) That the duty of so using a reasonably safe place, and of so operating a reasonably safe appliance, that neither the place or appliance shall become dangerous, is the duty of the servants who use and operate the same, and not a part of the positive duty of the master.

(f) That the doctrine of *res ipsa loquitur* does not apply to appliances and places furnished an employer by a third person, unless it is *proved* by competent evidence that the appliance and places so furnished were in an open and apparently dangerous and defective condition.

(g) That the various facts necessary to establish negligence on the part of the employer must be proved by competent evidence, and not by presumption, and that one presumption or inference can not be based upon another presumption but each presumption can be based only upon legal proof.

## II.

That whatever condition was shown by the evidence with reference to the dolphin and plank, the dangers of that condition were known, or should have been known to and appreciated by the defendant in error, as well or better, than the plaintiff in error! and that the defendant in error assumed the risk of all injury therefrom.

## III.

That the evidence conclusively showed that the

defendant in error was guilty of contributory negligence.

#### IV.

That the error of the Court in giving an erroneous instruction as complained of in our Assignment of Error numbered 2, was not cured by the subsequent correction, in view of the principle that if an instruction asserts an erroneous legal principle, it is hazardous to presume that the jury did nevertheless arrive at a correct verdict.

#### V.

That the error of the Court in refusing our requested instruction numbered 1 (see our Assignment of Error No. III.), was not corrected or covered by other instructions which the Court did give, in view of the legal principle that, where a special issue of facts is raised in the evidence, either party is entitled to a special instruction directed toward that issue, to-wit: in this case, the issue whether or not the method of approach from the wharf to the dolphin was in accordance with the general and usual custom.

#### VI.

That the plaintiff in error was entitled to the instruction it requested, viz.: that defendant in error and Brady were fellow servants.

#### VII.

That in view of all the errors, plaintiff in error



is entitled not only to a reversal of the judgment, but to an order dismissing the suit.

### POINT I.

It is obvious from a reading of the record, a brief statement of which has already been given, that defendant in error came into Court either thoroughly and unnecessarily unprepared to prove the allegations of his complaint, or knowing that he could rely more safely upon inference and presumption.

The facts show that the dolphin and plank in question were used constantly and almost daily by five or six large steamship lines each owning several vessels, and it seems ridiculous that defendant in error could not have produced more testimony upon the subject of the ownership of the plank from which Egan fell.

Defendant in error alleged that the Sperry Flour Company owned and furnished that plank, and came into Court under the legal obligation to make that proof, but failed to do so, and failed to produce any of the testimony that under the circumstances would be suggested to any one as available, and the Sperry Flour Company was dismissed from the proceeding. Defendant in error also failed to make clear just what defect he claims was the cause of the falling of the plank. We submit it is impossible to say from the evidence whether defendant in error claims that the

plank itself was weak or unsafe, because worn or rotten or in any other particular, or that no method whatever in fastening the plank to the dolphin was used, or that the fastening was itself weak and unsafe, or that the plank, though in itself safe and capable of safe adjustment upon the dolphin, was at the particular instant the defendant in error used it, placed on the dolphin in an unsafe position.

We claim it was up to the defendant in error to make clear or at least, as clear as possible, the particular danger or defect referred to in his complaint, and that he had no right to fail to produce or to keep back any evidence that would make clear that point, and attempt to rely instead upon the legal inference and presumption covered by the doctrine of *res ipsa loquitur*.

No attempt was made to produce the plank or show what had become of it, or that any search had been made for it, or whether it was in itself strong or weak, or defective in any particular, or whether it was too short; nor was any attempt made to show whether or not it was actually fastened to the dolphin or attempted to be fastened by ropes or stays, or whether, if so fastened, the ropes or stays or other method of fastening was defective in any particular at the time of the accident, and that such defect caused the accident.

In the absence of some statement of the efforts on the part of the defendant in error to produce such proof, we have a right to say that the case



was presented in the lower Court without careful or proper preparation, and that, generally speaking, defendant in error, failed to produce the proof that was available to sustain the allegations of his complaint, if those allegations were true. There is no reason to presume that the plank could not have been produced, or that more positive evidence could not have been produced as to the method by which it was attached to the dolphin, or the lack of any fastening, if there was no fastening. In fact, this failure to produce important available testimony, appears in the record itself, for an important witness available to the defendant in error was in Court at the time of the trial, and was pointed out by the defendant in error himself, as being "in court," and yet even no testimony of that witness was introduced. We refer to the long-shoreman Thurston, who, according to Egan's testimony, used this same plank in the afternoon at 3 o'clock, when the boat arrived, and when, as Egan says, "it was day light and he could see the "other plank which he was using at the time, from "one end to the other." (See Transcript, page 41, Egan's testimony.)

"Somebody else made fast the bow line.  
"It was Mr. Thurston. He is right here  
"(indicating in the court room)."

We claim further that the evidence fails absolutely to show anything whatever with reference to the condition of the plank and dolphin, except at



the very time the accident happened. Either this is so, or defendant in error must admit that if anything whatever is shown as to the condition of the plank prior to the accident, that condition is one that fails absolutely to present any evidence of actual negligence on the part of plaintiff in error.

If defendant in error seeks to rely upon the photographs introduced and the testimony of the witnesses as to what was the method used to attach this plank to the dolphin, he is conclusively bound by the full scope of that evidence. He can not select one item of testimony or another item of testimony and overlook the balance, because all of the testimony was produced by his own witnesses, and defendant in error is bound by the fair construction of the entire testimony so offered, and we submit that if that testimony, to-wit: the photographs and the testimony of Brady and Egan himself, showed anything at all as to what was the condition of the plank and dolphin prior to the date of the accident, it showed a condition which existed for at least one year and a half or two years prior to the accident, which was the same with reference to all of the planks and dolphins at the Sperry Flour Company's plant. It showed that the defendant in error had for this year and a half, or two years, been constantly in and about that plant, and making use of these same planks and dolphins, and must have been fully acquainted, therefore, and is conclusively presumed to have been acquainted with whatever condition

existed as shown by the photographs and testified to by his witnesses. Therefore, if defendant in error claims that the record does contain evidence as to what was the condition of the plank and its method of attachment to the dolphin *prior* to the exact time the accident occurred, and that that condition was dangerous and unsafe, we answer that the same evidence shows conclusively that the defendant in error himself was fully advised or should have been fully advised of all of such dangers and assumed any risk therefrom.

And we further contend, that if that evidence is considered to have any probative force whatever, it shows only that this particular plank, like the other planks used at the Sperry Flour Company's plant was merely an adjustable contrivance laid with one end resting on the wharf, and the other upon the dolphin; that it was easily adjustable by any employee making use of the same, being merely a ten-foot 2 by 12 plank. Certainly the Court will use its common sense and take notice of the fact that a plank of that size is strictly what is known as an adjustable contrivance, and an employer could not be charged with negligence for using the same, or allowing its employees to use the same under the circumstances shown in this case, especially where the evidence shows that it had been used in that condition continuously for a year and a half, to two years prior to the accident, and not only by employees generally, but by the defendant in error himself.



It is true Egan during his testimony did make the following answer with reference to whether or not he knew the end of the plank lying on the dolphin was unfastened, to-wit:

“I *supposed* that end was fast and secured, sufficient for me to go out to let go this line and go back with ordinary care and safety, and get back to the shore.”  
Page 37 of Transcript.)

We submit this answer was no evidence at all. It was merely a statement of what he understood to be his legal rights, and sounds very much as if he had obtained that knowledge from counsel learned in the law.

The supposition of witnesses as to certain facts that are necessary to be proven, is not proof; nor was the supposition of defendant in error, as testified to by him (even if we admit he labored under that supposition at the time of the accident), the controlling point. The question is, what ought he to have supposed in view of his knowledge and experience, and what risks ought he to have taken, or what care should he have used under all the circumstances. And, if the evidence which the defendant in error, himself, introduced, by photographs and by Brady, by Richter and others shows, as we claim conclusively it does (if it shows anything at all) that the end of the plank on the dolphin had been loose continually for a year and



a half or two years prior to the accident, and during all that time the defendant in error had been making use of this and the other similar planks at the Sperry Flour Company's plant, and he had full opportunity to know how it was adjusted or how it could be adjusted to reach the dolphin safely, then he had no right to suppose that it was in any other condition than the evidence shows it was during all of that time. Richter, it is true, tries to help out the case of defendant in error by stating that some time before these planks had been resting down upon a wire strap and had been fastened over with a wire strap, but upon being questioned as to how long this was prior to the accident, he admits that it was a year or a year and a half. (See page 31 of Transcript.)

On the next page, page 32 of Transcript, Richter says that "he and Joe (Egan) never took a line off of there since that time." That is, since a year and a half ago.

Of course, this means that he does not remember having worked there *together* with Egan since that time, because Egan himself says (See page 36, Transcript):

"I could not say how many times I have  
"been around the Sperry Flour Company's  
"plant—Oh, yes, I had been around there  
"many times. The last time I was there  
"prior to December 10th, I think must have

“been six weeks or may be a couple of  
“months before.”

He also admits, on page 36 of Transcript, that he had been out on the other plank the same day, and that both planks were alike, and we submit again, that if the photos and other testimony show anything whatever as to the method by which the plank was attached to the dolphin from which Egan fell, it shows exactly the same condition as to the other plank at the Sperry Flour Company's plant, which defendant in error admits having used at 3 o'clock that same day, when everything was light and he could see from one end to the other, and both of which planks were in exactly the same condition according to the testimony of witness Brady during the many years that he worked about the Sperry plant, with Egan as a more or less constant fellow workman, and which, according to Richter, had been in the same condition for at least a year or a year and a half prior to the accident, and during all of which time defendant in error himself admits he was frequently about the plant making use of this plank in the same way in which he was making use of the plank at the time of the accident. As witness Brady says, on page 27 of Transcript:

“All these dolphins have been used in  
“just that way all of these years, as far as  
“I know. I supposed a man with the long



“experience of Mr. Egan knew just what he  
“was doing.”

If it is admitted that Egan had been about the plant in a position where he could observe the condition of these planks a sufficient number of times to give him actual or constructive knowledge of the method by which they were adjusted to the dolphins, then certainly it needs the citation of no authorities to show that the use of such an adjustable contrivance was not in itself negligence. Our own local Supreme Court, which has gone as far as any Court to insure the employee against accidents, holds that even admitting the master was negligent in using a platform without a rail, an employee who fell off could not recover, for he had been about the plant enough to appreciate the danger.

See *Steeple vs. Panel Co.*, 33 Wash. 359.

There is hardly any work that is done in connection with the loading or unloading of a vessel or the care of any portion of a vessel that does not require of the sailor or longshoreman who performs that work the continual use of an adjustable contrivance such as this plank. Nearly every such contrivance made use of by such employees is an adjustable contrivance, to-wit, a plank loose at both ends and usually necessarily used because of the rise and fall of the ship or the floating wharf rising and falling with the tides or swaying under the stress and tension of ropes as the boat is being



warped into position, either when arriving or clearing, and it goes without saying, that every person working about a vessel, either as sailor or longshoreman, is taught by constant practice and by constant use of such contrivances to accommodate himself to these necessary conditions, and he exposes himself to the danger of that use voluntarily and necessarily. Even if the plank in question were so large as would require the assistance of two or three to adjust it, we believe a longshoreman with the experience that Egan had would be held to have assumed the risks of or connected with its use, although both ends were loose; but where, as appears in this case, the plank was so small that he alone could have made any necessary adjustment and without any delay and without calling upon any one for assistance, we submit with confidence, that the use of such an appliance by the plaintiff in error was in accordance with the common knowledge and experience of men in that business, and was not negligence.

The law is well settled that the master is not required to furnish the best or safest appliance, but only such as are in accordance with the general, usual and ordinary course of business, generally adopted and used by those in the same or similar business. And it was for this reason, and it was because the evidence did present this phase, that our requested instruction No. 1 should have been given, the gist of which is contained in the last

part of that instruction, namely: "A master is not obliged to adopt and use the newest and safest appliance. If what he does in fact use, is such as is in general use, that is all the law requires." (See our assignment of error No. III.)

We assume no citation of authorities is necessary to this point.

Thus far, we have argued on the supposition that the evidence and record does show something with reference to the condition of the plank prior to the time of the accident, and we claim that upon that assumption, the evidence shows conclusively a condition full known to the defendant in error and the dangers with reference to which he voluntarily and necessarily assumed. That is the necessary construction of the photos and of the testimony of Brady. He says positively this plank and both planks at the Sperry Flour Co. were in the same condition during the last year and a half at least, during which time he had worked about there many times with Egan. Defendant in error was content to let his testimony go at that and is bound by it.

We desire, however, now to present with fully as much confidence in our right to a dismissal of this suit, the other view, namely: That the record fails to show anything whatever as to the condition of the plank, save and except at the precise time of the accident, and that under all the circumstances, therefore, the record fails to show any notice, either



actual or constructive, to the plaintiff in error that the plank was defective or was defectively fastened, and that, under the law, plaintiff in error is not liable for the injuries sustained by defendant in error.

The Court will notice that the only positive testimony of any of the witnesses as to the condition of the plank, and the manner in which it was attached to the dolphin, was testimony that was brought out under cross-examination. Defendant in error was satisfied merely to detail the manner in which he received his injuries, and was evidently resting throughout on the theory that the doctrine of *res ipsa loquitar* would apply and that he was not called upon to show just what the defect was, or that any defect existed, but could rely upon the legal presumption that there was some defect, because the accident had occurred.

We do not anticipate that defendant in error will, on this appeal, argue that the record does contain any evidence as to just what was the alleged defect in the plank, or its fastenings. If he does, it will avail him nothing, he is bound absolutely by the necessary showing made by that testimony as a whole, viz: that the same condition is shown to have existed at the time of the accident as existed for a long time prior of which defendant in error had full knowledge. However, it is clear he did not attempt to prove in the trial Court the exact nature of the defect.



The only proof of that nature was drawn out of his witnesses on cross-examination, and was in no sense any part of the theory presented by the defendant in error as the basis for his claim of damages.

In the late case of *Schwab vs. Anderson Steamboat Co.*, 66 Wash. 236, the action was brought on the theory that the accident happened "within a certain park," that was under the jurisdiction of the defendant. The proof showed that it happened outside of the park, but there was also evidence to indicate that a case might have been predicated against the defendant on the ground that it had practically assumed charge of the place where the accident occurred, although it was outside the park, and the Court held that, although that might have been so, and although a case might have been presented on that theory, nevertheless, not having been presented in the pleadings nor tried out upon that theory to the jury, the verdict would have to be set aside. For other cases in point, see *Spokane Co. vs. Ry.*, 55 Wash. 545, holding that a failure to prove conversion, which was alleged, could not be changed to sustain a "breach of contract" which was not the theory presented to the jury.

See also *Bartlett vs. Ry.*, 58 Wash. 16.

So in this case, no attempt having been made by defendant in error to show in what particular

the plank or fastening was unsafe, it is too late now to say that that issue was made and fought out before the jury. That issue was not made and plaintiff in error was not called upon to meet it.

But, as already argued, even if that issue is to be deemed properly presented here, we say the record shows no negligence on our part, but, on the contrary, full knowledge and assumption of all risks on the part of defendant in error.

Taking the record, then, as attempted to be made and as made by defendant in error, we say it fails to show anything whatever with reference to the condition of the plank, except at the precise instant the accident occurred.

As already stated, it is admitted by the pleadings that the particular appliance which it is claimed was out of order or in a defective condition, to-wit: the plank to the dolphin, was (to quote from the complaint) "a part of the plant of the defendant, Sperry Flour Company, furnished by said defendant, for the use of ships while loading and discharging at its plant."

It was, therefore, an appliance or place for work *furnished by a third person*; and there is a line of authorities which we propose to cite that hold that under such circumstances the ordinary rule requiring the master to furnish a safe appliance is changed and modified. Under such circumstances the master in general is *not* liable for injuries by



reason of defects in such appliances or places, *except* where he has actual notice of the defects, or where the proof shows that the defects have existed so long during the time the master was using the appliances that he should have known of them.

In other words, the master must have either actual or constructive notice of such defects. 26 Cyc., p. 1109, sub. 3, and cases cited from N. Y., Geo., Ia., Wis., Mo., U. S., etc., etc.

And that, in effect, is what the defendant in error charged and what, therefore, he was obliged to prove. In paragraph IV. he alleges that the plank was insecurely fastened and unsafe and dangerous, and that those facts "were well known, or in the exercise of reasonable care and inspection should have been well known to the defendants." But he failed to *prove* anything about the fastening.

Absolutely the only proof of the alleged defects or of any actual notice or constructive notice thereof to defendant was the bare statement of the plaintiff himself as to how the accident happened, namely: that plaintiff took one or two, possibly three, steps out on the plank, and it tilted and went down, and he with it, onto the rocks below.

We may properly assume from that statement that the place was unsafe and dangerous at the time, the very instant of time, the accident hap-



pened. But we can go no further with any legal assumption or presumption.

No proof was offered or attempt made to show any *actual* notice to defendant that the place was dangerous at the time of the accident (in fact, the natural inference from the safe use of the appliance two hours before was a notice of safety, not of danger) nor was any attempt made to show that the place had been in the same dangerous condition for so long a time prior to the accident that the doctrine of constructive notice should be applied. There was no proof whatever as to the condition, whether safe or unsafe.

The record is absolutely bare of any evidence as to the condition of the plank at any time prior to the accident, save only that it was safely used in the ordinary way two hours before. The only inference that could be drawn from that evidence would be one of continued safety, certainly not one of danger.

There is, therefore, nothing *in the evidence* that shows that the plank was not—even five minutes before the accident—either in an absolutely safe condition, or a condition so apparently safe that any defects would not have been discovered by a reasonable inspection.

We can enter into the realm of speculation and surmise that the plank's condition prior to the accident was or was not in the same condition as at the

time of the accident, that it either had or had not been properly fastened, and, if fastened, that it had been displaced, or untied, or cut, etc., etc., but we *know* absolutely nothing. And so far as the record in this case goes, we have no more right to presume any one, rather than any other of the many possibilities that may be imagined as to the condition of the plank *before* the accident.

Some of those possibilities, if established by legal and direct evidence or legal presumption, would be sufficient proof of defendant's negligence. But many others of those possibilities would fall far short of proof of negligence.

We have as much right to *presume* one state of facts or one assumption as another.

There is no legal evidence in the record as to what the conditions were five minutes or at any time prior to the accident.

Of course, plaintiff will argue *res ipsa loquitur*, and that the defective condition, having been shown at the time of the accident, the burden then shifted and it was up to us to prove that that defective condition did arise suddenly and not only was not known to us, but could not have been known by the exercise of reasonable care and inspection.

We contend that would not be the law even if we were held to the same degree of care and duty to provide plaintiff with a reasonably safe place, etc.,

that a master is under with reference to appliances and premises furnished by himself.

LaBatt on Master and Servant, Sec. 156:

“It is not enough to prove the existence of  
“a defect at the very moment of the accident,  
“but it must also appear that the master had  
“an opportunity of previous knowledge, or  
“that the facts were such that he might by  
“the exercise of the proper care and diligence,  
“have known of the defect.”

So in *Green vs. Seattle Athletic Club*, 60 Wash.  
300.

“Failure to make certain tests is not neg-  
“ligence where it does not appear that such  
“tests were common or prudent or where the  
“owner had no reason to think an inspection  
“was necessary.”

In the present case, what possible reason was there to make the master think an inspection—that is, a special inspection—was necessary?

Here was an appliance furnished for the indiscriminate use of many different employers and their employees. It was “always there.”

We used this appliance at this particular dock. We used other appliances at other docks. Surely we were not called on to make a special inspection of every appliance so furnished us. Surely we had the fair right to presume that such appliances fur-



nished as a part of a more or less public wharf were in a safe condition unless *apparently* and *obviously* in an unsafe condition.

And if under all the circumstances an inspection—a special inspection—was not common or called for, we could not be held liable under the authorities cited. Every employer makes the ordinary inspection of using his eyes to see that a necessary appliance is at hand. But it is admitted that the necessary appliance (a plank) was at hand in this case. It is not attempted to be shown that that appliance was itself weak; nor is any attempt made to show in what respect it was not properly fastened. It was a contrivance and appliance admittedly easy of adjustment and even if we had furnished it ourselves we could not be held liable on the evidence in this record, where two hours before the accident it had been used safely in the ordinary way, from which the master could fairly infer no inspection was needed.

Where the appliances, etc., are furnished by a third person, and there is no proof of actual knowledge or constructive notice of an alleged defect, no case is made out whatever by the plaintiff and he must be non-suited.

The Supreme Court of the State of Washington has applied the *Res Ipsa* doctrine as far as an elastic and sympathetic conscience will permit and has gone far beyond most other Courts in that respect.

But even that Court has failed to go the length that would be required to sustain the verdict in this case. And it is still the law of this state, as it is the law in the United States courts, and in New York, Pennsylvania, Rhode Island, Illinois, Virginia, and every other jurisdiction where the question has been presented, that where the appliances are furnished by a third person, the doctrine of *Res Ipsa* does not apply and mere proof that an accident happened because of *some* defect does not make a *prima facie* case against the employer unless further facts are proven which show either that the employer had actual knowledge of the defect or that the defect and the opportunity for observing it had existed for a sufficient length of time to make the doctrine of constructive notice applicable. See the case above cited, *Staples vs. Panel Co.*

That is the law as settled in this state in the late case of *Wilson vs. Cain Lumber Co.*, 64 Wash. 533.

It must be conceded that defendant had no actual notice of this defect in this case. No *attempt* was made to prove it. Nor were any *facts* proven on which the doctrine of constructive notice could be based.

Proof of the location and relative positions of several contiguous but inert masses, like a wagon on the level street, or a plank resting on a pile, carries with it perhaps the presumption that the



objects will continue in that same position until nature or some outside force moves them; but it does not carry with it any presumption whatever as to how *long* those objects *have* occupied their same relative positions.

As stated in 16 Cyc., p. 1052: "Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time, but not that it has previously existed."

It is also logic and well settled law that "one presumption cannot be based upon another presumption," or in other words, the "facts upon which an inference may legitimately rest must be established by direct evidence as if they were the very facts in issue."

16 Cyc., p. 1051.

So in this case the very utmost we can say of plaintiff's proof of the manner in which the accident happened and the way the plank acted when plaintiff stepped on it, is that it proved the place was unsafe at that particular time and because of a weakness or rottenness in the plank itself, or in its fastenings to the dolphin, or because it was not fastened at all and did not lay on the dolphin, but merely up against it, or because its fastenings had been untied, or cut or removed, or because the plank had been pushed out of place, etc., etc. The exact cause of the dangerous condition must be left to



*inference* and *presumption*. Now, if we allow ourselves to presume that the exact cause of the unsafe condition was one particular thing, say a lack of *any* fastening, and that the plank was not resting securely on the pile, we must presume still further that that lack of any fastening and condition existed for a sufficiently long time to give us constructive notice thereof. Constructive notice is itself a presumption, and we are, therefore, necessarily left to base the presumption of constructive notice upon the presumption of the real nature of the defect, and the length of time it existed, i. e., we must establish by inference and presumption (for there is certainly no direct evidence on the subject) that the defect was open, evident and apparent, and we must then further presume that that open and apparent defect continued in practically the same condition for some considerable length of time, sufficiently long, at least, to invoke the further legal presumption that we did have notice thereof.

Thus we have not only one presumption based on another, but a third presumption based on the second.

And that is exactly what cannot be done under the law, either by Court or jury.

16 Cyc 1051, par. 5, and cases cited under notes 7 and 8, and see also Cyc. Annotations for 1911, on same points (1051, notes 7-8).

Thus in a Missouri case.

*Huttig vs. Springfield*, 124 S. W. 1094.

The fact proven was that the sheriff seized certain goods in a replevin suit. The Court held that while they *might* presume from this fact that a replevin bond had been delivered to the sheriff they could not further presume that the bond so presumptively delivered had been approved (p. 1097). "Presumptions must be based on facts, and one presumption cannot be based on another," citing 16 Cyc. 1051, and other authorities.

*Stephens vs. Smith*, 106 S. W. 533: Of a payment of money by a deceased woman to her daughter involving three presumptions (p. 534). "To reach an ultimate fact by such process would violate a fundamental rule that a legal presumption always must rest immediately on a fact, not on another presumption."

*Haynie vs. Hammond*, 103 S. W. 581: "It is not permissible to build one presumption on another, and thus make a cause of action."

We have already quoted Cyc. to the point that the record contains no legal proof of any facts on which the doctrine of constructive notice could be based—and as already stated there was no attempt even to prove actual notice.

We cite here an authority from the State of Washington to the same effect and a case which is,



we feel, on all fours with this case, and which establishes the doctrine we rely on, viz: that where the master uses an appliance and place that is owned and furnished by a third person, the strict doctrine of the "safe place," "safe appliances," "necessity of reasonable inspection, etc.," does not apply, but the injured employe must prove not only a defective appliance or place and injuries resulting therefrom, but also *notice* thereof to the employer, either actual or constructive.

We refer to the case of *Wilson vs. Cain Lumber Co.*, decided Aug. 10th, 1911, 64 Wash. 533.

In that case the defective appliance was a defective brake staff, which, while subjected to ordinary strain, broke. It was proved to have been broken before and that an attempt had been made to repair it and weld it, and it was alleged the brake staff was evidently and apparently weak and defendant had notice or should have known thereof.

It was on a railway car loaded with defendant's materials which had been hauled to defendant's plant and turned over to defendant temporarily for unloading and reloading, and plaintiff, in defendant's employ, was thrown and injured because the brake staff broke and plaintiff was thrown under the car. It was not denied that the appliance was defective. So, in our case, we may admit that the plaintiff did prove that the plank was defectively and insecurely fastened *at the time of the accident*.

In the case cited the Court held that "the law is



“that (under such circumstances) the master was  
 “bound to take notice of such defects as were patent  
 “or might be discoverable by the exercise of such  
 “reasonable diligence as the circumstances of the  
 “case demanded. For the high degree of care put  
 “upon a railway company, having its own cars and  
 “shops and men employed to do that service, should  
 “not be put on to one who merely loads or unloads  
 “the cars of another.”

So in the present case, the owner of this plank, if it had a latent weakness, might be held liable, while plaintiff in error would not be liable.

The Court then says, on page 537: “Passing  
 “this point, we come to the main case: Has an  
 “omission of duty been shown. *There had been no*  
 “*inspection*, nor does it appear to have been the cus-  
 “tom to inspect. While it is the duty of the master  
 “to inspect, it is also the law that he will not be held  
 “liable if it is made to appear that a reasonable in-  
 “spection would not have discovered the defect. In  
 “other words, unless the defect was patent the mas-  
 “ter is not liable for an injury to his servant from  
 “the giving way of such a structure on which the  
 “servant is required to work, unless the master  
 “knew, or by the exercise of reasonable inspection  
 “might have known, of the defect therein; and this  
 “is especially true where the means and opportunity  
 “of inspection are equally open to the servant.”

4 Thompson, Law of Negligence, Sec. 3952;  
 Id., Sec. 4396.

So in this case, in the absence of any evidence as to just what did cause the accident, how can the Court say even a special inspection would have disclosed anything to be remedied. It is fairly to be inferred even that it was apparently all right—at least, we had the fair right to presume so, the plank having been used in the ordinary way by Egan's fellow servants only two hours before, and used safely and without any report of any weakness or danger. The Court further says, in *Wilson vs. Cain Lumber Co.*:

“A patent defect is one that is open or which  
 “might have been discovered upon casual examina-  
 “tion. These rules were known to respondent, and  
 “he has attempted to show that the defect was  
 “patent. The broken staff showed that it had either  
 “been improperly welded, or had been broken after  
 “being welded. This is indicated by the fact that an  
 “area of about one-fourth of the area of the frac-  
 “ture, and at about the center thereof, was bright,  
 “while the remaining surface was rusted and dis-  
 “colored, showing that the union was not perfect.  
 “Some witnesses swear that there was also a bright  
 “surface about the edges. *No one saw, so as to testi-*  
 “*fy to the appearance of, the staff before the acci-*  
 “*dent, so that respondent resorted to opinion evi-*  
 “*dence to sustain his case.* The staff was made of  
 “black iron, and there is testimony showing that  
 “there was some rust and scurf about the weld. All  
 “of the witnesses agree that it is what is called a



“rough weld; that is, not smoothed down as is done  
 “in fine work; that the only way to test a weld is to  
 “strike over an anvil or twist it, as the expression  
 “goes; that a rough weld does not indicate weakness  
 “in the iron, or that it is a bad job, one witness stat-  
 “ing that it would indicate that the workman was  
 “satisfied with his job and not undertaking to cover  
 “anything us. So that we take it that, unless there  
 “was something apparent other than the weld, ap-  
 “pellant would not be liable. Respondent undertook  
 “to prove that there was a patent defect in the staff.  
 “His principal witness, who on the next day saw the  
 “part that was broken off and through whom re-  
 “spondent sought to sustain this theory, testified,  
 “after describing the appearance of the broken staff,  
 “as follows:       \*   \*   \*   ”

The lower Court had held, on motion for direct-  
 ed verdict, that there was enough evidence to go to  
 the jury; that it was for the jury to say whether  
 an ordinary man would not have made sufficient in-  
 spection to have discovered the defect.

And the Supreme Court then holds as follows,  
 on the question whether there was sufficient evi-  
 dence to go to the jury:

“But we think the Court erred in assum-  
 “ing that the rather doubtful opinion of the  
 “witness was sufficient evidence that there  
 “was a crack in the brakestaff, or that, if so,  
 “it could have been noticed. He well says:



“ ‘Is that enough,’ etc.; but there is no evidence to show what was a general method, or whether there was any method other than observation, or whether any other method would have been practical. *The verdict of the jury must find some basis in the evidence. They are not permitted to speculate or say what might have been; nor is a witness to be allowed to speculate or theorize, and from his own hypothesis, express an opinion of what might have been, and pass it as original evidence. Neither the witnesses nor the jury are permitted to guess as to whether the defect was hidden or not, or to presume negligence from the happening of the accident.*

“Moreover, it is not enough to prove the existence of a defect at the very moment of the accident, but it must also appear that the master had an opportunity of previous knowledge, or that the facts were such that he might, by the exercise of the proper care and diligence, have known of the defect.”

The Court. in *Wilson vs. Cain Lumber Co.*, cited in support of these principles several well considered cases, among others, *Read vs. New York etc. Ry. Co.*, 37 Atl. 947, where the Court, in granting judgment notwithstanding the verdict, said “the plaintiff testifies that the defect would have been discernible by the eye if it had been daylight, but

“it is evident that this statement is merely his “*inference* from the fact that the brake rod was so “easily twisted off in his attempt to set the brake.”

In both the *Read* case last cited and the *Wilson* case from our own Supreme Court, the plaintiff had recognized the necessity of proving some facts on which to base the charge of constructive notice of the defect and witnesses had testified as to inferences and expert opinions were given on the subject and there was, in each case, something in the record, besides and in addition to the bare fact that the accident happened, on which plaintiff claimed their right to go to jury on the question whether the defect was latent or apparent, and whether reasonable inspection would have disclosed it.

But in the present case there is absolutely nothing to go to the jury except the statement of defendant in error himself as to how the accident happened and that statement leaves it quite uncertain as to just what caused the accident. It might have been a patent defect, and it might just have well been a latent defect, it is a pure guess which.

And whatever the condition was at the time of the accident, the record is bare of anything that would enable us by any legal, or logical, or reasonable process to determine how long that condition had existed.

In the *Wilson* case the Court said: “*Neither*

“*the witness nor the jury* are permitted to guess as “to whether the defect *was hidden* or not.”

In our case defendant in error failed even to put on any witness to make a similar guess and all that is left for him is the guess of his counsel.

Counsel for plaintiff makes one guess, that the defect was open and apparent, and another guess that that condition had existed long enough to put defendant on notice with respect thereto. We guess that the defect was latent, or that whatever defect there was had not existed long enough to put us on notice.

Which guess is right? It is all a matter of argument and guess, of assumption or illegal presumption. There are no *facts* in the record on which to base any legal presumption.

Plaintiff's counsel utterly failed to prove against defendant the negligence charged or any negligence. Further on in the *Wilson* case, on p. 544, the Court says:

“This verdict was necessarily speculative,  
“for there is no basis for it other than the in-  
“ference of the witness, drawn from a hypo-  
“thesis which he admits is based upon pure  
“conjecture.”

In our case there is not even the *inference* or hypothesis of a sworn witness. There is only the guess and argument of counsel.



In the *Wilson* case the Court remanded the cause for new trial, on the supposition that “upon a re-trial plaintiff may prove this case by *competent* “evidence.”

We filed both a motion for new trial and one for judgment of dismissal. Where a plaintiff has put in all his evidence and it is clearly insufficient to sustain a verdict, we think we are entitled to judgment of dismissal notwithstanding the verdict, but if that is not granted, the new trial must be.

Where a plaintiff has directly charged and assumed the burden of proving our knowledge of the defect (either actual or constructive) and we have (as we did) specifically denied any such knowledge, and the plaintiff has then, as we claim, failed to prove the issue so made, the case should be dismissed and not merely sent back for a new trial.

There is no justice in giving either party two chances before the Court on the same issues.

The cases cited by the Supreme Court of this state in the *Wilson* case fully support the principles stated.

In the *Rhode Island* case, 27 Atl. 947, the plaintiff had attempted to meet the necessity of *some* proof of knowledge by testifying that the defect (which was an imperfect welding of two pieces of a broken brake rod) was discernable, but the Court said “this testimony has evidently merely

“his *inference* drawn from the fact that the brake “rod was so easily twisted in his attempt to set “the brake.”

In the present case there is not even any such inferential testimony in the record, just the bald statement that when plaintiff walked out on the plank it went down and he with it.

Why it went down is a matter of pure inference. Whether it had been properly and even absolutely safely fastened five minutes before, or whether it was for a long time in an unsafe condition is all a matter of pure inference.

In the New York case, 31 N. E. 220, the reasoning is so entirely applicable to the facts of the present case that I will quote largely from the opinion, to-wit:

“The difficulty with the plaintiff’s case “is that it lacks proof that the injury was “caused by any defective appliance. The “case is barren of any evidence that the “drawhead which broke was defective in “such a manner as to involve liability to “plaintiff on the part of the defendant. It “may have broken on account of a latent “defect in the iron, which no inspection “would have reached. Whether it did or “not we do not know, and there is no evidence upon the subject. No facts are “shown from which the cause of the accident

“can be more than guessed at. There is  
“food for speculation or wonder, but there  
“is no evidence as to the cause. Regarding  
“the alleged defect in the drawbar on the  
“locomotive the evidence is very light that  
“the small deviation from a straight line  
“constituted a defect at all. It was but an  
“inch or an inch and a half in three feet,  
“and the only evidence on the subject on the  
“part of the plaintiff showed that there was  
“no difficulty in coupling the drawbar to  
“the drawhead of a car, excepting on a  
“curve. After the accident, the cast iron  
“head of the drawhead where the link goes,  
“and to which a bolt is attached, was found  
“broken, and lying in front of the engine,  
“and attached to the drawbar thereof.  
“These two facts constitute all of plaintiff’s  
“evidence as to the cause of the accident.  
“We may speculate and wonder whether  
“the accident was or was not caused by this  
“alleged defect in the drawbar, and whether,  
“by reason of this slight bend, it did not  
“unduly press against the drawhead, and  
“thus cause the fracture of the latter; but  
“there is nothing in the case that would per-  
“mit us to exchange our speculation or  
“wonder for a belief formed upon the evi-  
“dence. If the accident occurred by reason  
“of a latent defect in the drawhead of the  
“car, the defendant would not be liable in



"this case if it had employed competent  
 "persons to build the car, and exercised  
 "proper diligence in that behalf. Where  
 "there are two or more possible causes of  
 "an injury, for one or more of which the  
 "defendant is not responsible, the plaintiff  
 "in order to recover, must show by evidence  
 "that the injury was wholly or partly the  
 "result of that cause which would render  
 "the defendant liable. IF THE EVIDENCE  
 "IN THE CASE LEAVES IT JUST AS  
 "PROBABLE THAT THE INJURY WAS  
 "THE RESULT OF ONE CAUSE AS OF  
 "THE OTHER, THE PLAINTIFF CAN-  
 "NOT RECOVER. *Searles v. Railroad Co.*,  
 "101 N. Y. 661, 5 N. E. Rep. 66; *Taylor v.*  
 "*City of Yonker*, 105 N. Y. 202, 209, 11  
 "N. E. Rep. 642."

In the Illinois case, 27 N. E. 62, the same sort  
 of an accident happened as in the Rhode Island and  
 Wilson case, viz.: plaintiff was trying to operate  
 a brake on a gravel train belonging to the defend-  
 ant. The brakerod suddenly gave way, he fell  
 under the wheels and was seriously injured. There  
 was no evidence of any defects except the statement  
 of plaintiff as to how the accident happened; from  
 which it appeared that while he was operating the  
 brake in the ordinary way, putting his strength on  
 it, something loosened or gave way and he pitched  
 forward.

It also appeared that the car was furnished the defendant by a railway company and had not been inspected by defendant.

The lower Court directed a verdict for defendant and plaintiff appealed.

The opinion then states that the evidence established the fact that "the accident was clearly due "to the breaking from no fault of plaintiff of the "appliance which he was handling," and that plaintiff's case must rest on the charge that defendant was negligent in failing to furnish proper cars equipped with suitable appliances and in failing to keep them in proper repair.

Then on page 63 the opinion continues as follows:

"But there is in this case no proof which  
"would make appellees liable if the accident  
"had occurred on one of their own cars.  
"Plaintiff neglected to prove a necessary element in his case—he has not shown that  
"the accident was the result of negligence  
"on the part of appellees. He alleged such  
"negligence in his declaration, and the burden was on him to prove it. Proving that  
"the brake-chain parted, or that something  
"gave out so that the brake-wheel suddenly  
"turned with him and threw him from the  
"car, does not show that appellees were  
"guilty of negligence. Why did the brake-

“chain part? Was it too light, not of the  
“usual and proper size, or not properly at-  
“tached? Did it break because of a defect  
“in one of the links, or was it worn out from  
“use? If there was a defect in it, could it  
“have been discovered by proper inspection?  
“To these questions the evidence introduced  
“by plaintiff furnished no answer. It is  
“suggested, however, that plaintiff proved  
“that there was no inspection of this car,  
“and that the failure to inspect was negli-  
“gence which entitles plaintiff to recover;  
“that the failure to inspect throws on ap-  
“pellees the burden of showing that the brake  
“apparatus was properly constructed, and  
“that there was no defect in it that an in-  
“spection would have disclosed. This im-  
“poses the burden on the wrong party, and  
“compels the defendant to prove that the  
“injury did not result from his negligence.  
“*The proposition goes on an unwarrantable*  
“*assumption, to-wit: that an inspection*  
“*would have discovered the defective condi-*  
“*tion of the brake. That is an affirmative*  
“*proposition, to be shown by the evidence,*  
“and the burden of proving it rests on him  
“who asserts it. If plaintiff had shown that  
“the fault in the brake was in fact known  
“to appellees’ foreman or car inspector, but  
“unknown to himself, he would have made  
“out his case, and so, too, he would have



“made his case had he shown that the defect  
 “was of such a nature that it would have  
 “been known to them if they had exercised  
 “due care. No defect is latent which an  
 “inspection will disclose, hence appellees  
 “would be charged with knowing what an  
 “inspection would inform the mot; but before  
 “a court or jury can say that their negli-  
 “gence in failing to inspect the car was the  
 “cause of plaintiff’s injury, it must be shown  
 “by the evidence that the fault or defect in  
 “the appliance was one which a proper in-  
 “spection would have made known to them.  
 “This appears to be true on principle and it  
 “is very clearly established by authority.”

And the Court cites in support many strong authorities from Illinois, Wisconsin, Massachusetts and New York.

The Court in the *Wilson* case cites 4 Thompson on Negligence, Sec. 4398, the caption of which paragraph is “company must have had knowledge or means of knowledge and opportunity to “repair”; and the section then proceeds: “It is “not enough to prove the existence of a defect at “the very *moment of the accident.*”

And the author cites many cases in support of that proposition, among others, a Pennsylvania case, 25 Atl. Rep. 587, where a brake broke under or-

dinary stress and use. The Court says, on page 587, col. 2:

“In the present case the point presented  
 “by the plaintiff declared the liability of the  
 “master simply upon proof that the brake  
 “was out of order at the time of the acci-  
 “dent, and that the plaintiff was thereby  
 “unable to control the car, so that it ran  
 “away with him. These are not all the  
 “conditions which are requisite to establish  
 “the negligence for which a master is re-  
 “sponsible to his servant, and therefore it  
 “was error to affirm the point with qualifica-  
 “tion. In point of fact, there was no proof  
 “of a defective brake at any moment prior  
 “to the happening of the accident, and wheth-  
 “er there was such a state of circumstances  
 “as that the master might be held liable we  
 “cannot discover from the facts in evidence  
 “as they now appear.”

In another Pennsylvania case, *McGinter vs. Lehigh Company*, 73 Atl. Rep. 552.

An accident happened under exactly the identical conditions as those in the Wilson case. The Court reaffirmed the doctrine of earlier Pennsylvania cases that a company temporarily using cars supplied to it for loading and unloading is not required to carefully inspect and is not liable for injuries suffered by reason of defective brakerods

unless *plaintiff* proves the company had either actual or constructive notice of such defects.

In other words, under such conditions the proof of the accident only and of defects at the time of the accident is entirely insufficient. That proof must be supplemented by proof of actual notice of such defects or by *proof of facts* on which the doctrine of constructive notice can be based.

The Federal Court cases are also to the same effect. *Fairbanks vs. Walker*, 160 Fed. 896, page 898, where the premises do not belong to the defendant "the ordinary rule as to the duty of the "employer in respect of the safety of the place "where his work is being done does not apply."

To the same effect:

*Westinghouse vs. Callaghan*, 155 Fed. 397.

*American Co. vs. Seeds*, 144 Fed. 605.

*Norfolk Co. vs. Reed*, 167 Fed. 16, page 24.

In the case last cited there was an alleged defective brake. After discussing various theories the Court *assumes* that it was the master's duty to furnish a brake in perfect working order and to keep it in its normal position (the brake in question being what is known as a "drop-brake"), and then take up the question as to how or by whom the brake was placed in the abnormal position it occupied at the time of the accident.

In the same way in our case the Court might



assume that it was our duty to furnish a reasonably safe plank and means of getting out to the dolphins and to exercise reasonable care to keep it safe—the question would still arise how and through whom and *when* did the plank become unsafe? Especially would these questions arise where the evidence shows that two hours before the accident this appliance received the test of actual use (which is certainly one form and often the best form of inspection) and was proved safe.

In the *Norfolk Company* case the Court continues on page 24, as follows:

“There is nothing in the evidence to  
 “justify the inference that the brake, on  
 “this occasion, was placed in an abnormal  
 “position by an employee of the railroad,  
 “because there is no evidence to show that  
 “any one acting for or on behalf of the com-  
 “pany attempted to move the car until 11  
 “a. m. of that day, and the inspection was  
 “made between the hours of 3 a. m. and  
 “6 a. m. The finding of the brake in an  
 “abnormal position was one of those unfore-  
 “seen contingencies which the master could  
 “not by any means anticipate, and to hold  
 “the master liable under such circumstances  
 “would be to ignore all precedents, and to  
 “establish a rule which would impose upon  
 “the master a duty, the performance of  
 “which would be a physical impossibility.

“There is not a scintilla of evidence to show  
 “*how long* the brake had been in an abnor-  
 “mal position. It may have been 30 minutes,  
 “or it may have been an hour, or longer.  
 “ \* \* \* ”

And further on the following language is used:

“The learned judge who tried this case  
 “below, in a very able opinion, in discussing  
 “the law relating to this phase of the ques-  
 “tion, among other things said:

“ ‘It is undoubtedly true that the general  
 “rule governing the proof requisite in the  
 “case of servants injured by defects in mach-  
 “inery or appliances requires that the plain-  
 “tiff prove, not only the defect, but that the  
 “master either know of it, or that it had  
 “existed for a sufficient length of time to  
 “warrant the fair presumption that he should  
 “have known of it.’

“This is undoubtedly a correct statement  
 “of the law, and, when we come to apply the  
 “evidence in this case, we are at a loss to  
 “see upon what theory the jury could have  
 “arrived at the conclusion that the injury  
 “was due to the negligence of the master.  
 “There is nothing in the evidence, so far as  
 “we can discover, to justify the inference  
 “that the condition of the brake had existed

“since the last time the same was handled in  
“the regular operation of the train.”

And after a further summing up of the case, the Court comes back to the principle of sound logic, law and judgment, announced in the first part of this brief, viz.:

“The whole question as to how and by  
“whom the brake was placed in an abnormal  
“position is involved in uncertainty, and,  
“in order to reach any conclusion in regard  
“to the matter, it is necessary to base an in-  
“ference upon an inference, and this would  
“be in violation of the rules of evidence by  
“which we are controlled in determining  
“this controversy.

“In view of all the facts surrounding this  
“case, we are of the opinion that there was  
“not sufficient legal evidence in this case  
“to sustain a verdict in favor of the defend-  
“ant in error, and that the Court below erred  
“in refusing to grant the motion to direct  
“a verdict in favor of the defendant below.”

The Supreme Court of the State of Washington has never yet allowed speculation or inference to take the place of positive and necessary proof, but that is just what is required to sustain the verdict in this case.

The *Wilson* case, already cited, is a perfect piece of accurate and conclusive reasoning on that point.



The same principle is asserted in *Dahlstrom vs. Inland Bos Mfg. Co.*, 61 W. 325, on page 329:

“If we cannot say how the accident happened, how can we say that it was the result of improper or inadequate instructions. If it was all a mystery to the respondent, could it be less a mystery to the jury? If we are to indulge in *speculation*, etc.”

In *Weckter vs. Great Nor. Co.*, 54 Wash. 203, on pages 207-208, the Court says:

“The testimony left the cause of death a mere matter of speculation and conjecture,”

and cites in support of the doctrine that under such circumstances (that is where speculation and conjecture are a material fact of plaintiff's case against defendant), a verdict will not be warranted, the following cases, viz.: *Hanson vs. Co.*, 31 Wash. 604, where plaintiff showed he was injured at a saw, but was unable to show how, and the Court quoted this language from *Patton vs. Co.*, 179 U. S. 658:

“The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an *affirmative fact* for the injured employee to establish that the employer has been guilty of negligence.  
“ \* \* \* That in the latter case *it is not*

“sufficient to show that the employer may  
 “have been guilty of negligence—the evidence  
 “must point to the fact that he was. And  
 “where the evidence leaves the matter uncer-  
 “tain and shows that any one of half a  
 “dozen things may have brought about the  
 “injury, for some of which the master is re-  
 “sponsible and for some of which he is not,  
 “it is not for the jury to guess between those  
 “half a dozen causes and find that the negli-  
 “gence of the employer was the real cause.”

This same doctrine is announced and controls  
 in the other cases cited:

*Armstrong vs. Campolis*, 32 Wash. 110.

*Stratton vs. Nichols Co.*, 39 Wash. 174.

*Stone vs. Crewdson*, 44 Wash. 691.

*Peterson vs. Union*, 48 Wash. 505.

*Oldsteam vs. Hastings*, 48 Wash. 657.

*Whitehouse vs. Bryant*, 50 Wash. 563.

*Craig vs. Co.*, 56 Wash. 640.

*Hellison vs. Co.*, 56 Wash. 278.

*Shore vs. Co.*, 57 Wash. 212.

*Deaton vs. Abrams*, 60 Wash. 1.

All of those cases hold that where it is neces-  
 sary to enter the realm of speculation and conjec-  
 ture to sustain plaintiff's case, it must fail.

A Virginia case, *Washington vs. Taylor*, 64  
 S. E. 975, affirms the same doctrine where the  
 complaint failed to *allege* either actual or construc-

tive knowledge of the fact that a trolley pole was defective, and fell and injured plaintiff because of the defect.

In fact it is elementary that a complaint is demurrable that does not contain that allegation. And if it is necessary to allege knowledge it is equally necessary to prove knowledge—either actual or constructive, and the authorities heretofore cited show clearly that that proof must be made up of facts, not of inferences and assumptions.

Another strong and nearly parallel case is from Massachusetts, *Robinson vs. Sylvester*, 90 N. E. 413.

There plaintiff's hair caught in a belt fastener. The evidence showed she was using it in the proper way and without any fault.

But the Court says:

“Except the fact that in *some way* the “fastening caught in plaintiff's hair, there is nothing to show that it was defective, or “to show, *if it was defective, how long it had “been so     \*     \*     \*     ”*

“Possibly it could be fairly inferred from “plaintiff's description of the accident that “the twisted part of the wire had bent or “sprung out and did not lie flat upon the “belt as it should. But if that be so, and “assuming that such a condition would con-



“stitute a defect, *it does not remove the difficulty*, for there was absolutely nothing “to show that it had been in that condition “for such a length of time that the defendant ought in the exercise of reasonable “care to have discovered and remedied it.”

Similar cases could be cited to an extreme and unnecessary length. They differ in many details.

The reasoning of the courts in the various jurisdictions may vary considerably, but the same principle is firmly established in all, viz.: that where the alleged defect exists in a place or appliance furnished by a third person the master can not be held guilty of any negligence whatever, until it has been proved by competent evidence—not by mere inference—that he had either actual or constructive notice of the defect.

The fact that the premises were not owned by the master was considered an important point in *Fairbanks vs. Morse*, 160 Fed. 896, where the floor was uneven and caused an accident.

*Hamilton vs. Louisiana*, (La)., 41 S. 560. There a lumber company was permitted by a railway company to operate its private log train on the railway track and a wreck occurred and the lumber company’s conductor was killed owing to a defective bridge.

It was held that the railway company was liable to the conductor, but that the lumber company was

not; that the lumber company in using the track and bridge did not assume the burden of inspecting or repairing same, but relied, as did all of its employees, on the railway company to meet that burden—just as we had a right to rely on the Sperry Flour Company.

The judgment against the lumber company was therefore set aside.

Now, in that case, had it been shown that the lumber company knew or had either actual or constructive notice of the defective condition of the bridge, the verdict against the company would have been sustained undoubtedly. But the mere proof of the accident and that it was due to a defective bridge, although sufficient as against the railway company, was not sufficient as against the lumber company.

Knowledge either actual or constructive must be proven (*Anderson vs. Co.*, 19 Wash. 575, at p. 584), especially where (as here if the plank was adjustable) the employer must get his information as to conditions largely from plaintiff's fellow workmen.

We contend there is no answer to our position in this matter that is entitled to any weight whatever except under a strained and improper application of the doctrine of *res ipsa*.

The Washington Supreme Court has gone the limit in the application of that doctrine, but the case of *Wilson vs. Cain Lumber Company*, already cited,



establishes beyond any question the fact that it cannot be invoked here, nor in any case where the appliances and premises are furnished by a third person.

In the *Wilson* case, the appliance was being used in the ordinary way without fault on the part of plaintiff and it broke.

Those facts, we may admit, might call for the application of the *res ipsa* doctrine as applied by the local Supreme Court, if the appliance had been furnished by the plaintiff in error.

But when the local Court say in effect, in view of the fact that the applinace was not furnished by the plaintiff in error, the doctrine of *res ipsa* does not apply, and the defendant in error must prove something more before a verdict will be sustained, viz.: he must prove that plaintiff in error either had actual knowledge of the defect or constructive knowledge thereof. When the local Court takes that position, we can confidently assume that the Federal Court will limit the application of the doctrine in the same way.

As a matter of fact, the legal presumptions are all in favor of plaintiff in error, and the great weight of authority is against rather than with our local Supreme Court in extending the application of the doctrine of *res ipsa* as far as it has. So, we say, when that Court has made a limit, we believe the Federal Court will not exceed it.



Thus *Cyc.*, on page 1411, Vol. 26, says: "No "presumption of negligence arises from the mere "happening of an accident," and cites in support voluminous authorities from nearly every state, and in a later paragraph, on page 1412, states that the "*presumption* is, in the *absence of evidence to the contrary*, that the master has performed his duty "with reference to furnishing reasonably safe appliances and places to work, and had no notice of "any defects therein."

And many authorities are cited in support from Alabama, California, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, South Carolina, and in the annotations for 1911, additional authorities are cited from Arkansas, Illinois, Montana, Missouri, New York, Oregon and Texas.

In the present case, therefore, the legal presumption is that the appliance was in a reasonably safe condition an hour or two before the accident. That presumption is supported by the only evidence that was introduced as to its condition at any time *prior* to the accident, the proof being that it was used in the ordinary way safely and without complaint or report of defect two hours or so before the accident. And there is no evidence whatever to show when or how the unsafe condition at the time of the accident did in fact arise. We may make a guess—but one guess is as good as another.

How then can the Court say or allow the jury to

say that the record contains any legal evidence of negligence?

The trouble with plaintiff's case is that he failed in his proof. He first failed in proving that defendant, Sperry Flour Company, owned and furnished the appliance.

Had he made that *proof*, the rules of evidence as against the owner of the appliance might be sufficient to keep the plaintiff in court *as against such owner*, but not as against this defendant. We say *might* be sufficient because we do not admit a case was made out against us, even assuming we were the owners of the plank and dolphin. On the contrary, we insist that even as against the owner the proof of the accident must be supplemented by something to show what *defect* is complained of as having caused the accident, and by further proof that that defect was of such a nature or had existed so long as to impute to us notice of its condition.

This is practically the holding of a late Washington case, *Cole v. Spokane*, 119 Pac. 831:

"It (doctrine of *res ipsa*) has never been  
"carried to the extent of raising a presump-  
"tion of negligence from the mere fact of  
"injury."

In the present case defendant in error was compelled by his pleading to prove more than the mere happening of the accident.



As against us he alleged and thereby assumed the burden of proving either actual or constructive notice of the defect. He has failed to make that proof under the principles announced in the authorities quoted.

This same argument and to a large extent the authorities quoted in support of the doctrine announced in *Wilson v. Cain Lumber Co.* were presented to the trial court in support of our motions for a new trial and for judgment notwithstanding the verdict; but they were brushed aside by the trial judge with the statement that cases involving the technical and latent defects of a faulty brake beam could not be considered applicable to the case of an open and apparent danger caused by an unsupported or unfastened plank which the employee was required to use.

And that same position will, of course be taken on this appeal by defendant in error.

And yet that statement of the trial judge was, it seems to us, pure assumption. No such condition is shown by the record. And to hold us negligent on the theory propounded by the trial judge, you must first presume from the accident itself, i. e., from the fact that an accident did happen, you must infer, because the evidence certainly does not show the details of that accident and its cause, you must presume that it had some one cause out of many possible causes—and then you must further



presume that the cause so first presumed was so apparent and had existed in that condition so long that we were conclusively presumed to have known of it.

The first presumption (that the cause of the accident was an open and apparent danger) is unwarranted, because several things might have caused the accident that were not open and apparent. And the second presumption (that the danger had existed for a sufficient length of time to affect us with notice) is illegal, because, as already shown, the authorities agree that one presumption can *not* be based on another.

And that is common sense. The burden of *proving* negligence rested throughout on the plaintiff in error, and could not be met by mere inference and presumption.

The employer can not be mulcted in damages merely because an employee is hurt while at work for him, nor because the employee was injured without fault on his part (which last is not admitted in this case), nor because the manner in which the accident happened would indicate that something might have been wrong. Before the master can be held, the inference must be clear that something, *for which the master was responsible, must* have been wrong, or at least wrong for so long before the accident that the master should have known it, and had it corrected. And the evidence as to what

caused the accident must be clear and, apart from any inference, show both these facts, which are conditions precedent to any right of recovery.

The trial judge and the reasoning he followed in denying our motions, also entirely ignored the logical and necessary construction of the evidence as to nature of the defect shown, if we admit any such defect was shown.

That is, if the trial court's reasoning was based on the assumption that the photos and the evidence of Brady, Richter and others did, in fact, show the condition of this plank *prior* to the accident and that condition was dangerous, or that the evidence was sufficient on that point to go to the jury, and let them say whether it was unusually and unnecessarily dangerous, then we say again, that defendant in error was bound by the full scope of that evidence and neither he nor the jury nor the Court can place any such construction on the evidence (which, it must be admitted, was not the theory of defendant in error in the trial court) without also accepting the further fact as proven by *the same evidence* that whatever the condition shown that same condition existed as to both this plank and the other at the Sperry Flour Co.'s wharf for at least one and a half to two years prior to the accident, during all of which time defendant in error was more or less constantly in and about the same and using the same and in as good or better position to know and



appreciate the dangers and is conclusively presumed to have known the same and to have assumed them.

See *Staples v. Panel Co.*, 33 Wash. 359.

So that taking either horn of the dilemma the defendant in error is out of Court.

If the record fails to show a condition of danger prior to the accident, he goes out because of failure to prove that the accident happened because of any danger of which we had notice, either actual or constructive.

If the record does show a condition of danger prior to the accident, he goes out because the same record shows that condition was fully known to him and its dangers assumed.

### POINT I.

That simple, adjustable appliances like a plank, ladder, etc., do not require of the employer inspection with reference to dangers or defects that could be readily corrected by adjustments made by the employee himself and that the employer is not responsible for defects arising during the course of the work. See

Cyc., Vol. 26, p. 1109, sub. 3.

*Am. B. Co. v. Seeds*, 144 F. 605-608.

“It is not the master’s duty to repair defects arising in the daily use of the appliances for which proper and suitable materials are



“supplied and which may easily be remedied  
“by the workmen.”

So in the present case, there is no *proof* that the plank was defective, or the fastening (if one was used)—so the presumption would be that they were sound.

There is also positive proof that two hours before Egan used this appliance, it was used in the ordinary way and safely used without any report of any danger.

If, meanwhile, some new danger arose by reason of the plank or fastening being displaced by outside interference or by other workmen, the master could not be held responsible for the resulting danger.

*Brady v. Chicago*, 114 F. R. 100, 57 L. R. A.  
712.

Held:

“The duty of so using a reasonably safe  
“place and of so operating a reasonably safe  
“appliance that neither the place nor appli-  
“ance shall become dangerous by their  
“negligent use or operating is the duty of the  
“servants who use or operate them and not  
“a part of the positive duty of the master.”

So in the present case, it accords with common sense, as well as the authorities cited, that having supplied a safe, adjustable plank, in proper position

at 3 o'clock, it would be unreasonable to hold us responsible for dangers and changed conditions arising during the progress of the work two hours later.

See also

- 1 Labbatt, Secs. 136, 164, and
- 2 Labbatt, Secs. 1719 to 1722.

See also

- 2 Labbatt, 586-8.
- Ryan v. Co.*, 23 Pa. St. 384.
- Hursey v. Conger*, 20 N. E. 556.
- Desel v. N. Y.*, 70 N. Y. 171.
- Kinnear v. Webber*, 45 N. E. 860.
- Siddal v. Pac.*, 38 N. E. 969.
- McGovern v. Co.*, 64 N. W. 891.
- Wilson v. N. P.*, 71 Pac. R. 713.
- Porter v. Co.*, 54 N. W. 1019.

And servant cannot complain of dangers about which he could or should have known.

- Staples v. Panel Co.*, 33 Wash. 359.
- Woeflin v. Co.*, 49 Wash., p. 412.
- French v. Co.*, 24 Wash. 83.
- Anderson v. Co.*, 19 Wash. 575.

Sub. (f) and (g) of Point I. are supported by authorities heretofore cited.

## POINT II.

That defendant in error assumed all the risks with reference to use of the plank, he, by his experi-

ence and training, being in a better position to know those dangers than plaintiff in error.

*Woeflin v. Co.*, 49 Wash. 405, at p. 412.

That a servant cannot complain of dangers about which he knew or should have known as much as his employer.

*French v. Co.*, 24 Wash. 83.

*Anderson v. Co.*, 19 Wash. 575.

Which authority fully approves this doctrine as laid down in Wood on Master and Servant, §328.

### POINT III.

The contributory negligence of defendant in error is supported by the authorities already cited. See particularly

*Steeple v. Panel Co.*, 33 Wash. 359,

where the employee fell off of the unguarded platform, but it appeared he had worked long enough about the place to be familiar with the dangers.

So here, if the evidence does show any dangers, it also shows the defendant in error to have been, in law, entirely familiar with them.

His counsel will argue, of course, he had to act quickly, and could not wait to see whether the plank was still safe, whether it had been displaced, etc.

But that argument does not appeal to one who



considers the instrumentality he was using, a simple, easily adjusted plank.

Nor does the language used by Brady when he told Egan to loose the line indicate any rush.

See Egan testimony, p. 41, Transcript:

“He (Brady) says, ‘Well, Joe, you had ‘better stay and help with the line.’ I says, ‘‘All right.’ He says, ‘You can go to your ‘supper after we get her up to the other dock ‘and have her fast.’”

#### POINT IV.

That the Court’s instruction that the master’s duty to furnish a safe place and to inspect was the same with reference to instrumentality and places used by the master but belonging to others as that actually owned by him, was error and the error was not wiped out by the subsequent correction.

*Rosine v. Co.*, 63 Wash., 430.

“It is hazardous to presume that the jury ‘did, nevertheless, arrive at a correct verdict, if erroneous legal principles have been ‘given them in the instructions.”

See also

*Grant v. City*, 107 N. W., 832.

*Roff v. Kester*, 125 Ind. 79.

The present is a case where the real owner,

Sperry Flour Co., was dismissed for lack of proof of ownership which defendant in error neglected to produce.

And with the sympathies of a jury aroused by Egan's injuries received while at work, and with the owner of the plank out of the case, it is easy to see that the positive announcement of our absolute responsibility for the condition of that plank was not cured by the rather soft-hearted and apologetic correction which the Court afterwards conceded us.

#### POINT V.

We were entitled to our requested instruction that we had complied with our duty to defendant in error if we furnished the usual and reasonably safe appliances, even if the jury might think they were not the safest and best.

That issue was clearly made in the evidence and we were entitled to an instruction upon it.

The principle of law covered by this requested instruction is too elementary to need citation of authorities.

That it was error to refuse same see 38 Cyc., p. 1626.

“It is the duty of the Court to submit to the jury and give instructions thereon any issue, theory, or defense which the evidence tends to support.” Citing cases from nearly every state in the United States.

## POINT VI.

That we were entitled to the instruction that Brady and Egan were fellow servants. See

*Am. B. Co. v. Seeds*, 144 F. R. 605-608, and cases cited.

*Olson v. Oregon*, 104 F. R. 574.

*R. R. Co. v. Baugh*, 149 U. S., 368, 384.

“*Prima facie* all who enter into the employment of a single master are fellow servants.”

“The servant assumes the risk of negligence of a superior fellow servant in directing the work, same as that of an ordinary fellow servant.”

## POINT VII.

Because of the errors with respect to the instructions we are clearly entitled to a new trial.

But we insist, on the record before us, the plaintiff failed to make a case and the suit should be ordered dismissed.

Cyc., 30, p. 507.

In general, the proprietor of the wharf is liable for damages to persons who use same by his permission and are injured because of an unsafe condition which he negligently permits to exist.

*The Nellie*, 130 F. R. 213.



Proprietor is bound to exercise reasonable diligence to ascertain the condition of his wharf.

Cyc., 30, p. 509.

He is so liable whether wharf is public or private.

*The Manhattan*, 169 F. R. 222.

*Shoemaker v. N. Y.*, 167 F. R. 975.

He is liable for obstructions in the channel alongside his wharf.

The wharf, of course, includes this plank and piling and all necessary appliances—indeed, the complaint alleges the plank and dolphin were part of the wharf and the answer admitted this.

We are all supposed to know the law and our actions are based largely on that knowledge.

So here, knowing that the Flour Co. was responsible for this plank and its use, as an approach to the dolphin, the reasonably prudent master would not be paintakingly *searching* for any defect in the apparatus. He would fairly presume that it was safe and unless there was some obvious defect, or something to put us on inquiry, the prudence and care of the average careful master would not even suggest the necessity of any further inspection than to see that the plank was there and was apparently sound.

Brady saw it there, but had no occasion to use it. He did know that it had been safely used by another longshoreman without any report of trouble.

We submit the record fails to show any negligence on Brady's part, and if he (who had charge of the loading) was not negligent, we were not.

Respectfully submitted,

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United States Circuit Court  
of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC STEAMSHIP  
COMPANY, a corporation,  
*Plaintiff in Error,*  
VS.

JOSEPH EGAN,  
*Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

---

BRIEF OF DEFENDANT IN ERROR

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J. F. FITCH, *of Counsel.*





No. 2149.

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---

## BRIEF OF DEFENDANT IN ERROR

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### STATEMENT OF THE CASE.

Respondent was a longshoreman in the employ of the appellant, Alaska Pacific Steamship Company in the lading of its steamship "Admiral Sampson" with a cargo of flour in Tacoma harbor; and the ap-

pellant was at the time of the injury using a certain dolphin composed of a group of piles driven near shore, situated from twelve to fourteen feet outside of a stone wall breakwater as a means of making the bow mooring line of its ship fast to the dock at the place of taking on its cargo. The usual means of approaching the dolphin for the purpose of casting off lines was by way of a plank two or three inches in thickness and ten or twelve inches in width extending from the shore out to the dolphin.

Respondent, who had been working in the hold of the ship, was directed by the foreman of the appellant to cast off the bow mooring line from the pile in the center of the dolphin that the ship might depart from the dock where she was then lying. This order was given after five o'clock in the evening of the 10th of December, 1911, and the evidence shows that it was dark at and about the dolphin in question. In obeying said order of the foreman the respondent went along the shore or sea wall to a point opposite the dolphin and undertook to cross over the plank from the sea wall to the dolphin to cast off said mooring line when the plank gave way and respondent was precipitated together with the plank to the rock fill below, resulting in the injuries complained of in this action.

The condition of the plank at and prior to the accident was shown by exhibit E, a large photograph introduced by respondent.



“It was admitted that the dolphin shown in the photograph, marked exhibit E, the largest of the photographs introduced by plaintiff, is the dolphin opposite the plant of the Sperry Mill Company, and from which Egan fell.” (Page 20, Transcript of Record.)

“During all of that time they used a plank in going to and from the dolphin such as is shown in exhibit E, or something similar to it laid in the way as shown in that picture, practically the same, from the shore right out on the dolphin.” (Page 28, Transcript of Record.)

“The planks lying out on these dolphins have been there every time I have seen them, all the time.” (Page 26, Transcript of Record.)

“The boards are not part of the dolphins. They are lying on the bank on the rocks and on the dolphins, just lying loose there.”

Q. “To the dolphin?”

A. “They had been tied some time ago, but they have been loose a long time after that.”

Q. “They have been tied some time before?”

A. “Yes, sir.”

Q. “But some of them have come loose?”

A. “Yes, sir. Had a piece of wire over it and tied so that they could not slip off the dolphin.”

Q. “Tied so that they would not slip on the dolphin?”

A. "Off the dolphin. The end on shore was never tied." Page 28, Transcript of Record.

Q. "That picture shows the condition in which that dolphin and plank had been in for a long time?"

A. "That plank did not lay on the dolphin; that plank lay on the wire strap."

Q. "But where is the wire strap?"

A. "The wire strap used to be there."

Q. "How long before was there any wire strap there?"

A. "I do not know how long ago."

Q. "Did you ever see any wire strap on that in your life?"

A. "Yes, sir, I did."

Q. "On that one?"

A. "Yes, sir."

Q. "How long was it before the injury to Egan?"

A. "Well, sir, I could not tell you. I do not remember, but I remember I had taken the line off and the plank was lying on the wire strap and fastened over with the wire strap."

Q. "Had you seen the wire there a month prior to the injury?"

A. "Well, sir, I saw the wire there before."

Q. "How long before the injury?"

A. "I could not tell you."

Q. "Could you give us an idea?"

A. "It might have been a year and might be a year and a half."

Q. "How many times have you and Joe (mean-

ing Egan) worked around there since a year and a half ago?"

A. "Me and Joe never took a line off there since that time."

Q. "Anybody could have seen the wire around there?"

"I have seen the wire there a great many times."

Q. "If the wire had been taken off a year and a half before, anybody who looked at it could see that it had been taken off?"

A. "I do not know. When a man goes to work he has to hurry up to get his line off, and he has not much time to look around." (Pages 31 and 32, Transcript of Record.)

Egan was familiar in a general way with the arrangement of the dolphins and their approaches, having observed them from time to time, and having assisted in putting the stern line on one of the dolphins the day of the accident. (Pages 36, 37 and 40, Transcript of Record.)

He did not know the condition of the plank and dolphin to which the bow line of the ship was attached and which gave away with him and caused his injury. (Page 36, Transcript of Record.)

These dolphins are not absolutely stationary, they "come and go" more or less with the swinging of the ship. (Pages 24, 25 and 29, Transcript of Record.) And this fact was known to the foreman of the appellant, Mr. Brady. (Pages 24 and 25, Transcript



of Record.) But was unknown to the respondent, Joseph Egan. (Page 40, Transcript of Record.)

This, then, appears to be the situation: a steamship tied to a dolphin, which sways with the swing of the ship; a plank twelve or fourteen feet in length leading from the shore to the upper part of the dolphin; knowledge on the part of the foreman of the steamship company that this dolphin sways or gives continually with the pull of the ship; absence of such knowledge on the part of the respondent; the necessity of the respondent in obedience to an order from the foreman to cross, in darkness, this plank to the dolphin, for the purpose of casting off the bow line. It appears to us that it would be almost criminal carelessness on the part of the master to send an employe into such a place, over such an appliance, on such a mission at such a time, unless the master absolutely knew that the outer end of that plank was securely fastened to the dolphin; knowledge which would be readily disclosed by an ordinary inspection, but knowledge which the servant could not have under the circumstances in this case.

It was admitted upon the trial of this cause, and the evidence clearly shows that no inspection whatever of this dolphin or any of the dolphins at this wharf was ever made by any one connected with the appellant company. (Pages 45, 46, 47, 48 and 49, Transcript of Record.)

## ARGUMENT AND AUTHORITIES.

Egan did not assume the risk. It was dark when he went to the dolphin and he could not see the exact condition (Transcript of Record, pages 34 to 40.)

He supposed the dolphin end of the plank was secured to the dolphin: "I supposed that end was fast and secured sufficient for me to go out to let go this line and go back with ordinary care, and safely get back on the shore." (Transcript of Record, page 37.)

The rule of law applicable to assumption of risk, under the evidence in this case, is well stated by Judge Shelby in *Harvey vs. Texas & P. Ry. Co.*, 166 Fed. 393, as follows:

"In the absence of a statute changing the rule at common law, it is implied in the contract of hire that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation. But in affirming this doctrine, the Supreme Court has said:

" 'It is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contempla-



tion, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master.' ”  
*Hough vs. Railway Co.*, 100 U. S. 213, 217, 25 L. Ed 612.

It follows that a risk which the master has negligently created by doing or permtiting something to be done, or by omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as one of the ordinary risks of the employment which the servant, as matter of law, is presumed to have assumed. 1 Labatt on Master and Servant, No. 270; *Ford vs. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598.

There is no rule of law more firmly established than that it is the absolute duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work, and the conditions under which it must necessarily be performed.

*Bunker Hill & Sullivan Min. Co. vs. Jones*, 130 Fed. 818.

*Union Pac. Ry. Co. vs. Jarvi*, 69 Fed 65.

*U. P. R. R. Co. vs. Peterson*, 162 U. S. 346, 40 L. Ed. 994.

26 Cyc. 1097-8 and authorities cited.



And in the performance of this duty regard should be had, not only to the character of the work to be performed but also to the conditions under which it must be performed.

*Bunker Hill & Sullivan Mining Co. vs. Jones, supra.*

26 Cyc. 1100-1101 and authorities cited.

And an employe has the right to presume, when directed to work in a particular place, that reasonable care has been exercised by his employer to see that the place is free from danger, and, in reliance upon such presumption may discharge his duties in such place unless there are obvious dangers which would cause a reasonably prudent employe not to do so.

*Clowe N Sons vs. Boltz*, 92 Fed. 574.

*G. Railway Co. vs. Jarvi*, 53 Fed. 68.

Ship owners employing laborers on or about vessels are bound to the same rules of care in regard to furnishing their servants with reasonably safe appliances and places for work, as other masters, and will be held liable for injuries caused by negligence in this respect.

26 Cyc. 1120-21.

*The Westport*, 131 Fed. 815.

*The King Gruffydd*, 131 Fed. 189.

*The Columbia*, 124 Fed. 745.

It is not only the duty of the master to use ordinary

care to furnish his servants with a reasonably safe place to work, but he must also by inspection from time to time, and by repairs when necessary, keep them in reasonably safe condition.

26 Cyc., 1136, and authorities cited.

*The King Gruffydd, supra.*

*The Columbia*, 124 Fed. 745.

*Union Pac. R. Co. vs. Snyder*, 152 U. S. 684-691,  
L. Ed. B., 38, 597.

And this duty to inspect is absolute and unalienable.

Thompson on Negligence, Sec. 3791.

And the master is chargeable with knowledge of what a reasonable inspection would disclose.

Thompson on Negligence, Sec. 3794.

And this non-delegable, non-assignable duty of the master to make reasonable inspection of the instrumentalities and place where his servant is required to work applies not only to instrumentalities owned by him but to instrumentalities which he is using even temporarily.

The rule in this regard is well stated in Second Labatt on Master and Servant, Section 584, where he says:

“As regards instrumentalities not belonging to the master, but temporarily placed under his control for the purpose of facilitating the transaction of bus-

iness in which both he and the owner have a common interest, the only rational and logical doctrine seems to be that a servant, inasmuch as he has nothing to do with the arrangements which the master may make with a third party for their mutual convenience, should be entitled to hold the master responsible for the negligent inspection of the things so transferred, in all cases in which he would have been able to recover if that thing had been owned by, or permanently in the possession of, the master."

*R. R. Co. vs. Myers*, 63 Fed. 793.

*Terre Haute R. Co. vs. Mausberger*, 65 Fed. 196.

*Felton vs. Bullard*, 94 Fed. 784.

*Gothib vs. R. R. Co.*, 100 N. Y. 462.

*Goodrich vs. R. R. Co.*, 116 N. Y. 398-401.

*R. R. Co. vs. Mackey*, 157 U. S., 72-91.

*R. R. Co. vs. Archibald*, 170 U. S. 665-669.

*McGuire vs. Bell Tel. Co.*, 167 N. Y. 208, S. C. 52 L. R. A. 437.

The contention of appellant that it is excused from the duty of inspection and from the duty of using every reasonable precaution to furnish safe appliances and places for its men to work because it did not own, but was only temporarily using the appliance which caused the injury, is well answered by Chief Justice White in the case of *Texas Pacific Railway Company vs. Archibald*, 170 U. S. 665-674, when he says: "The argument wants foundation in reason and is unsupported by any authority. In reason, because as the duty of the company to use rea-



sonable diligence to furnish safe appliances is ever present and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, and the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated, and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation."

*Baltimore & Potomac R. Co. vs. Mackey*, 157  
U. S. 87.

We submit with all confidence that plaintiff's case was abundantly established by positive evidence given at the trial, and that not only negligence, but gross criminal negligence on the part of the appellant was likewise affirmatively shown; yet, if more was required, we submit that the accident, happening as it did, speaks for itself a case against the appellant.

The respondent was using an instrumentality furnished him by the master for the purpose for which it was intended, namely, as a means of going from the shore to the dolphin to cast off the mooring line of the vessel. He had been working in the interior

of the ship, was directed by the foreman, Mr. Brady, to go and cast off the line; he went to obey this order. No other servant was anywhere near him, and the act of no other servant could have contributed to his injury. The evidence is that he was using due care, obeying his instruction, in the ordinary way, and that he knew nothing of the condition of the plank, but supposed that it was properly fastened to the dolphin, hence neither the doctrine of fellow servant nor that of assumption of risk can enter into this case; and it would appear that he was absolutely without blame on his part, that he was injured through the giving away of an instrumentality furnished him by the master, while such instrumentality was being used in the manner contemplated for its use.

We submit that under all well considered cases upon facts such as these, the doctrine of *res ipsa loquitor* applies. In the late case of *Labee vs. Sulton Logging Company*, 51 Washington, page 83, the Supreme Court of the State of Washington uses the following language:

“In this case, the servant made proofs to the effect that the master furnished him with an instrument with which to do his work and directed him to do it in a particular manner; that he took the instrument and proceeded to perform the work in the manner directed, when the instrument gave way and injured him; and we think it no hardship to cast on the master the burden of showing that the instru-



ment was suitable for the purposes for which it was intended, and that any defect therein was unknown to the master, and by reasonable diligence could not have been discovered by him. This is not holding, as the appellant seems to argue, that a presumption of negligence arises from the mere fact of injury. The injury itself proves nothing; it may have been the fault of the servant. But in a case where the servant eliminates any fault on his part by showing that the injury was caused by the giving way of an instrumentality furnished him with which to work, while he was using it for the purposes intended, and in the manner directed, he shows that the fault is in the instrumentality itself for which the master is *prima facie* responsible. The case differs from an ordinary case of injury only in the manner of proof. In each case, of course, a *prima facie* case of negligence against the master must be made out, but in the one it is made out by showing the injury, and eliminating negligence on the part of the servant and his fellow servants, while in the other it is made out by direct evidence of negligence on the part of the master."

As was well said by the same court in the first decision rendered in the above case:

"Instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do not break when put to the use for which it is designed and used in a proper manner, it is evident that it was either defective in material or construc-



tion in the first instance, or has become so since it was put to use. Therefore, when the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended in the manner intended, and that it broke when being so used and injured him, he makes out a prima facie case of negligence against the master." 47th Washington, page 60. Citing *Coleman vs. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065; *Moynihan vs. Hills Co.*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. 348; *Tennessee Coal, Iron & R. Co. vs. Hayes*, 97 Ala. 201, 12 South 98; *Armour vs. Golkowska*, 95 Ill. App. 492; *Solarz vs. Manhattan R. Co.*, 31 Abbott's New Cases 426; *Highland Boy Gold Min. Co. vs. Pouch*, 124 Fed. 148; *Cincinnati etc. R. Co. vs. Roesch*, 126 Ind. 445, 26 N. E. 171.

The same court in the later case of *Cleary vs. General Construction Company*, 53 Washington, 254, applies the doctrine of *res ipsa loquitur* in favor of the servant where a scaffold furnished by the master gave way while being used by the servant in the ordinary way, and expressly affirmed their reasoning in the Labee case above cited, saying:

"Here the instrumentality, the defects of which are complained of, was furnished to the respondent by the appellant for a particular purpose, and it broke while being used in a proper manner for the purpose for which it was intended."

In the later case of *Graaf vs. Vulcan Iron Works*,

59 Washington, page 325, the same court held that:

“Common observation and experience teach that sound appliances do not break when employed in a proper manner, and in the use for which they were designed. If they break when so used it is a circumstance from which it may be inferred that either they were defective in the beginning, or had become so by use. There is no evidence of any negligence on the part of the appellant; he assumed only the risks that were open and apparent.”

And held that the doctrine of *res ipsa loquitur* applies where a wheel of a truck being used by a machinist gave way, injuring the machinist.

The rule appears to be that a presumption of negligence on the part of the master is raised where an appliance furnished by him breaks or gives away while being used by a servant in the usual and ordinary manner. *Madden vs. Occidental & O. S. S. Co.*, 86 California, 445; *Griffin vs. Boston & A. R. Co.*, 148, Mass. 143; *Cincinnati I. St. L. & C. R. Co. vs. Roesch*, 126 Indiana, 445; *Rushville vs. Adams*, 107 Indiana, 475; *Coleman vs. Mechanics' Iron Foundry Co.*, 168 Mass. 254; *Highland Boy Gold Mining Company vs. Pouch*, 61 C. C. A. 40, 124 Fed. 148.

Particularly would we cite in this connection Sections 7646 to 7650, inclusive, of Volume 6, Thompson's Commentaries on the Law of Negligence.

No error was committed by the court in refusing to give instruction number one requested by the ap-



pellant, for two reasons: first, there was no evidence offered upon the trial that the plank and manner of approach to the dolphin was according to the general, usual and ordinary course adopted by those in the same or similar business, and was in general use, and, second, had such evidence been given this fact would not justify the using of the dolphin and plank in question by the appellant without making any inspection as to its condition of repair, nor would it justify the using of the plank and dolphin when the same was out of repair and in a dangerous condition, and would do violence to two well established principles of law; first, that it is the duty of the master to inspect appliances and places of work furnished his servants to see that they are in reasonably safe condition, and it would shift the burden of making repairs when necessary from the master to the servant; in fact, would relieve the master from all obligation either to inspect the appliances used or to furnish the servant with reasonably safe appliances for his use.

The second instruction requested by the appellant was improper and the giving of the same would be contrary to law. 2nd Labatt on Master and Servant, Section 584, and authorities there cited; also Archibald, 170 U. S. 665; *Baltimore Railway Company vs. Mackey*, 157 U. S. 87.

The third requested instructions was properly refused for two reasons: first, the evidence all showed that William Wright or William Brady, Wright and



Brady being one and the same person, was the foreman empowered by the appellant with the hiring of its men and the directing of its men in and about the lading of its steamships in the Port of Tacoma, and was, according to every legal rule, a vice principal; and second, the only negligence chargeable to Brady was the failure to inspect and the failure to furnish a reasonably safe place and a reasonably safe appliance for the servant to work with; all of which is the master's non-delegable and non-assignable duty. Likewise under the authorities herein cited the giving of the instructions complained of was not error, as the same stated the duty of the master well established in law, and we respectfully submit that an examination of the instructions given as a whole shows that the court went the full limit of charging the jury favorably to the appellant, and that the charge as given declared the law in a way that left the appellant no legal grounds of complaint.

Counsel for the appellant seem to rely largely on the case of *Wilson vs. Cain Lumber Company*, 64 Washington 533, as an authority relieving them from the duty to inspect or to furnish a safe appliance. This case, instead of being an authority in their favor, is directly against them, as the Supreme Court of Washington, per Chadwick, Judge, expressly reaffirms the duty of the master to inspect, and holds the master responsible for all defects or want of repair that a reasonably careful inspection would have disclosed, and that this applies to appliances

owned by third parties as well as to appliances owned by the master. The learned judge saying:

“There is some contrariety of opinion as to the duty of a concern engaged as defendant was (in the logging business) to inspect cars turned over to it by another company; but while it is true that it is not a railroad in the strict sense, and has no shops or place or possible means to repair, and has no property in the cars, we think the trial judge properly applied the doctrine of *Woods vs. Northern Pacific R. Co.*, 36 Wash. 658, 79 Pac. 309. Appellant was using the car as an incident to its business, which in its nature involves a certain degree of hazard to life and limb, and some duty, to be measured by the circumstances of the particular case, rested upon it. Although in the *Woods* case the danger was held to be apparent, the court said:

‘The duty rested upon appellant to inspect foreign cars to see that no hidden dangers, such as want of repairs, involved its employees; \*

\* \* ,

And:

‘It is the duty of the receiving company to inspect and guard against defects of the foreign car from lack of repairs, and which may not be open and apparent to the employee.’

We do not want to be understood as holding that the duty of discovering hidden defects was upon appellant, for it was not; but only that the law is that it was bound to take notice of such defects as were patent or might be discoverable by the exercise of such reasonable diligence as the circumstances of the cause demanded."

The court, then, holds that because the defect was in a weld in a brake rod, which could have been discovered only by taking the rod out of the car and testing it upon an anvil, which was a part of the duty of the manufacturer, an inspection would not have disclosed the defect, and for that reason the company was not liable.

We respectfully submit that the record discloses no error of which the appellant has any just right to complain; and that the judgment of the trial court should be affirmed.

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